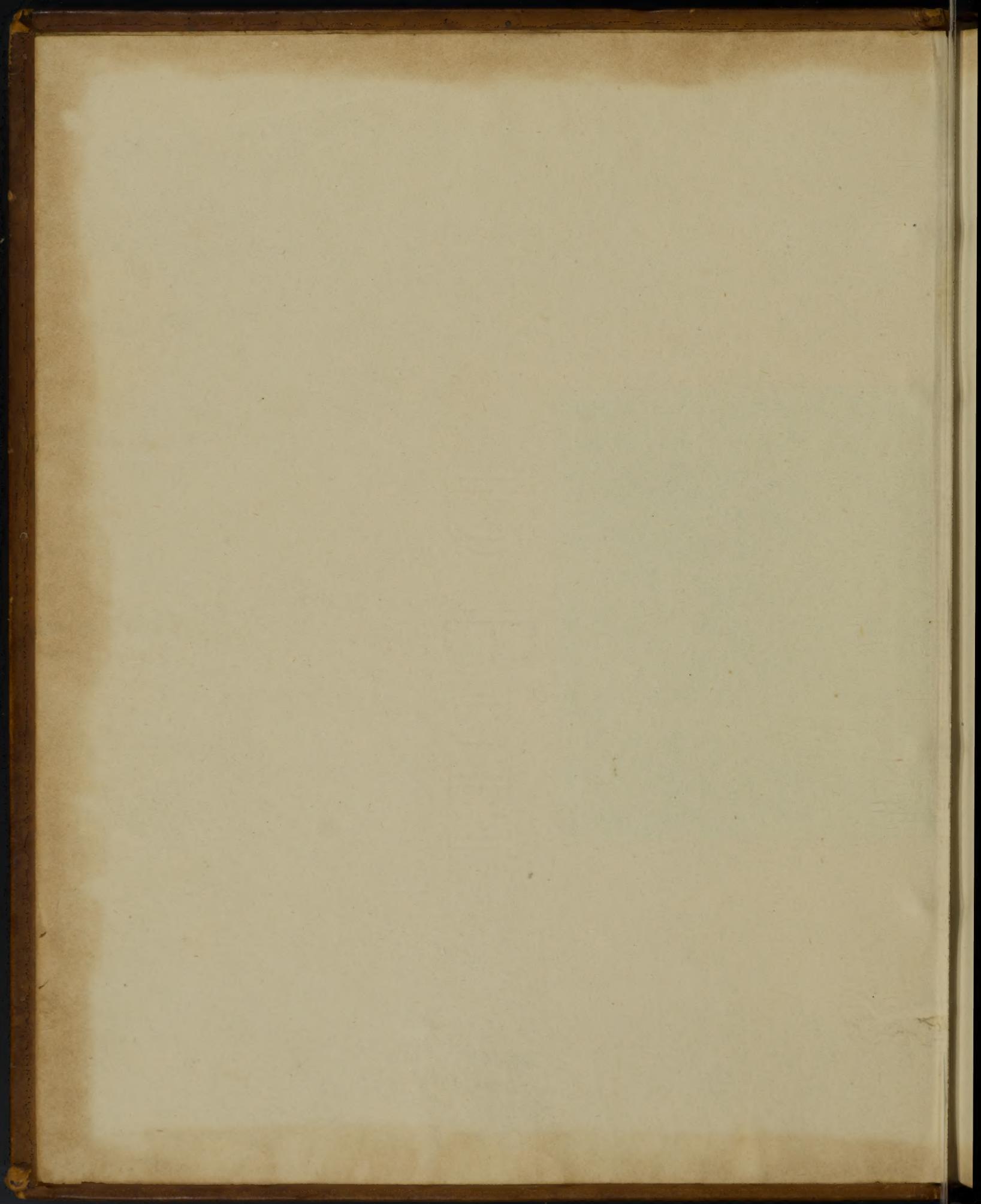
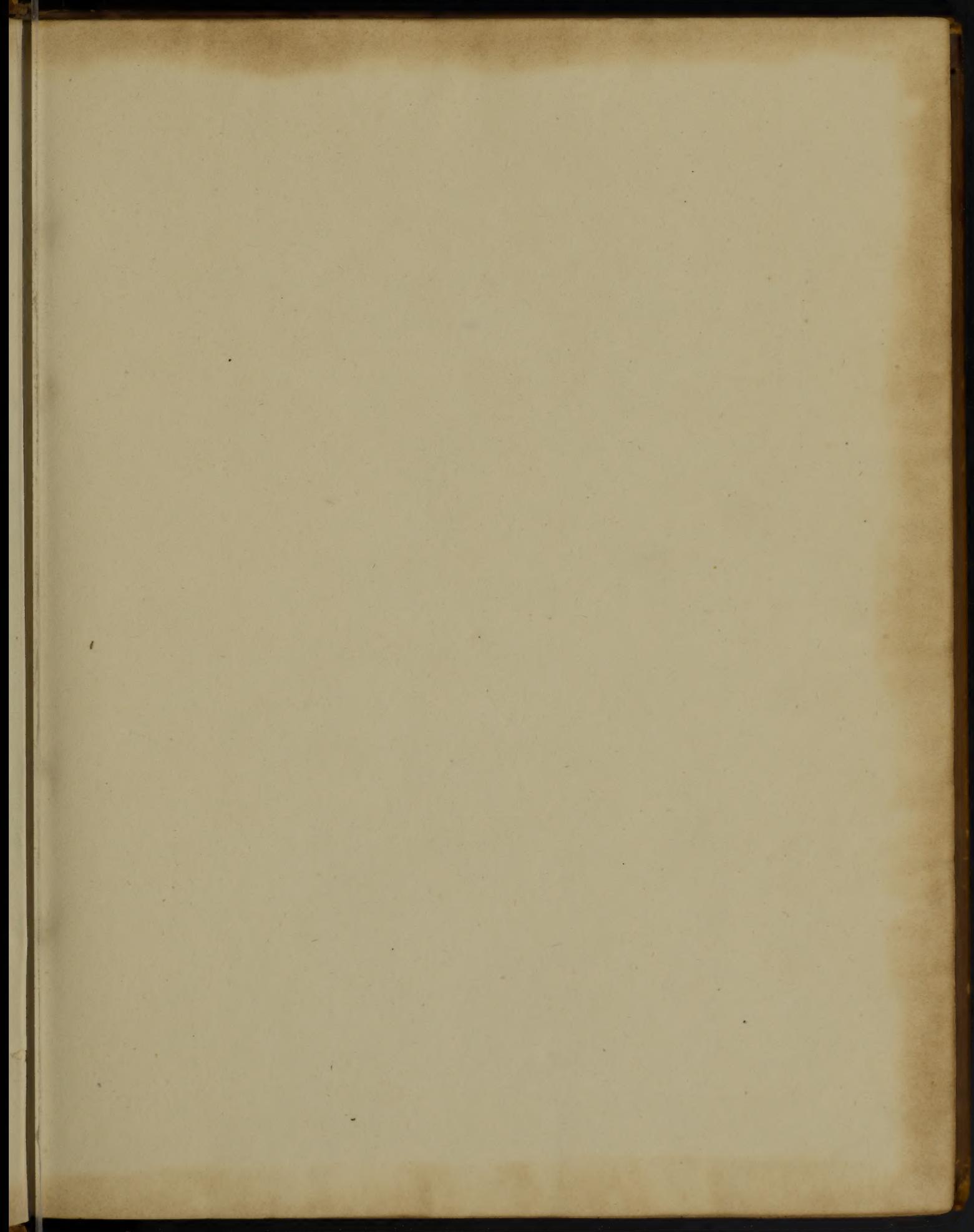


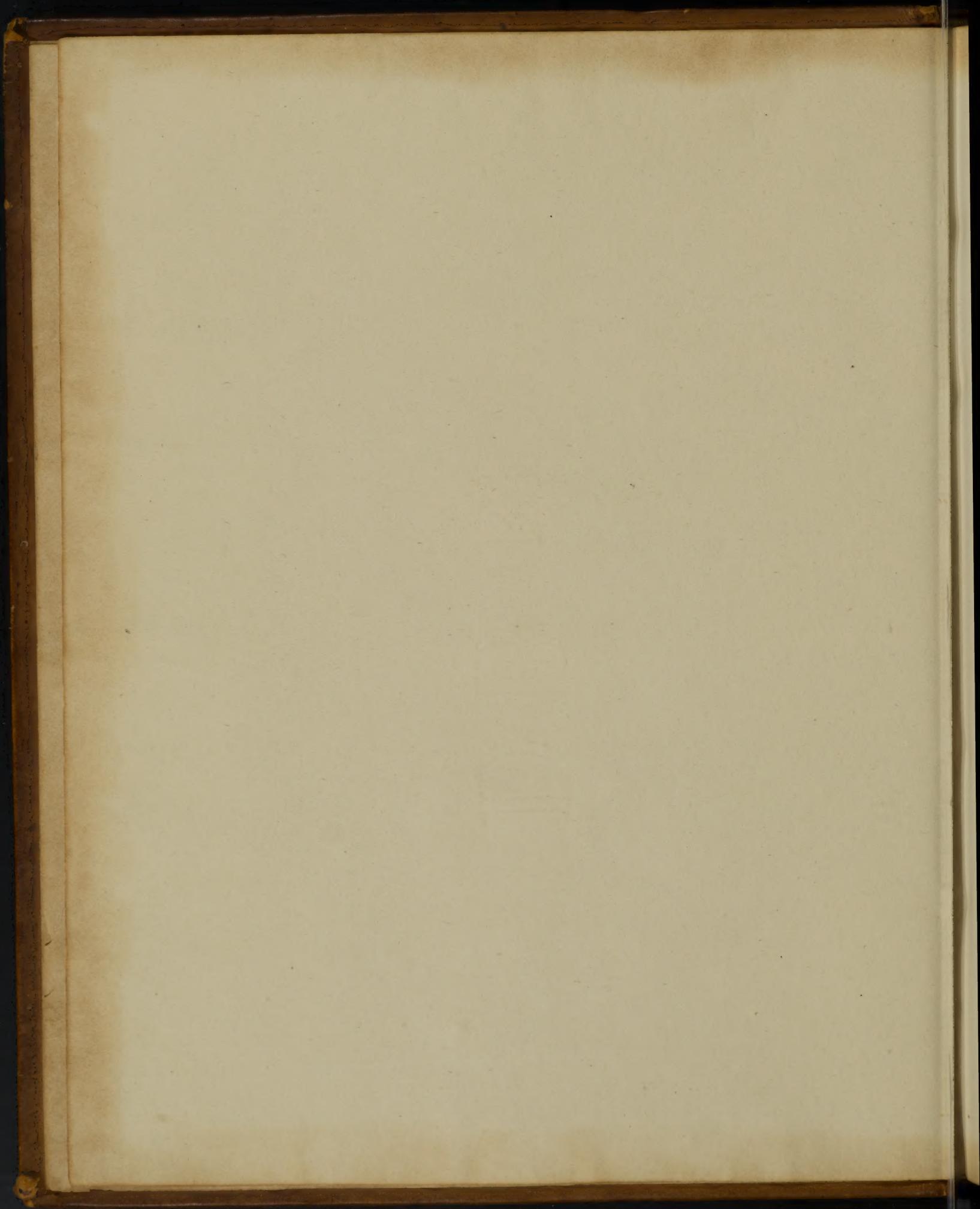
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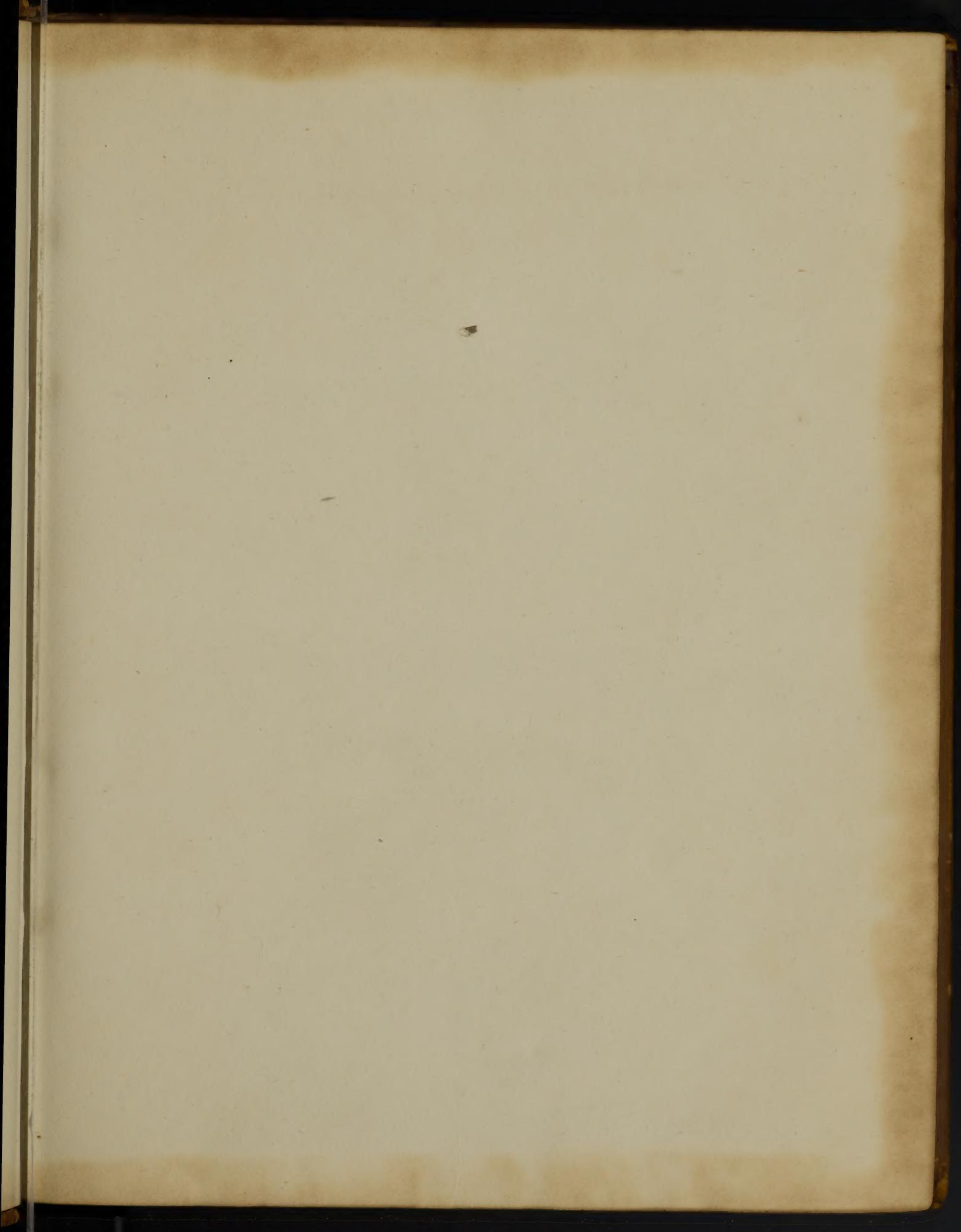
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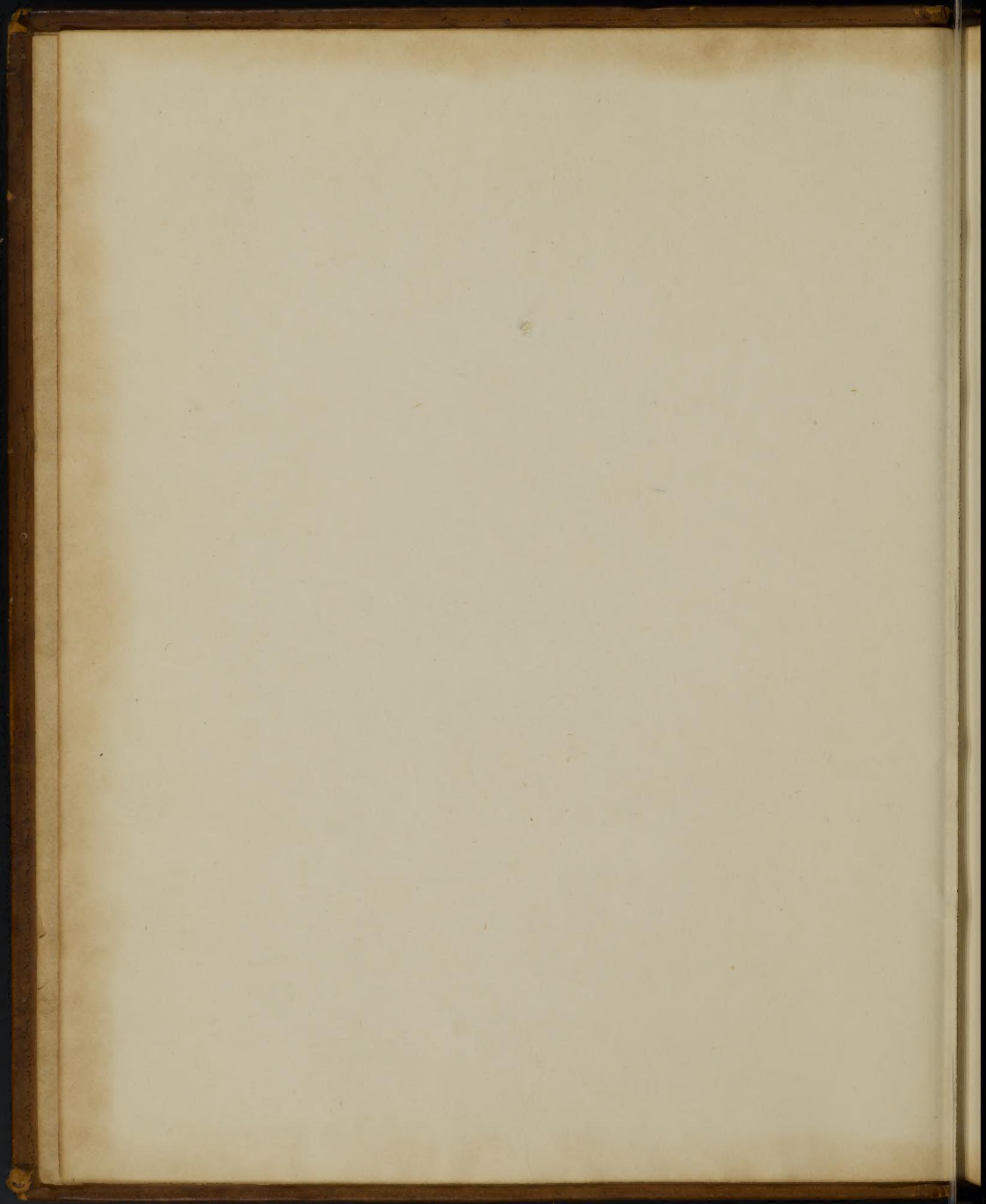


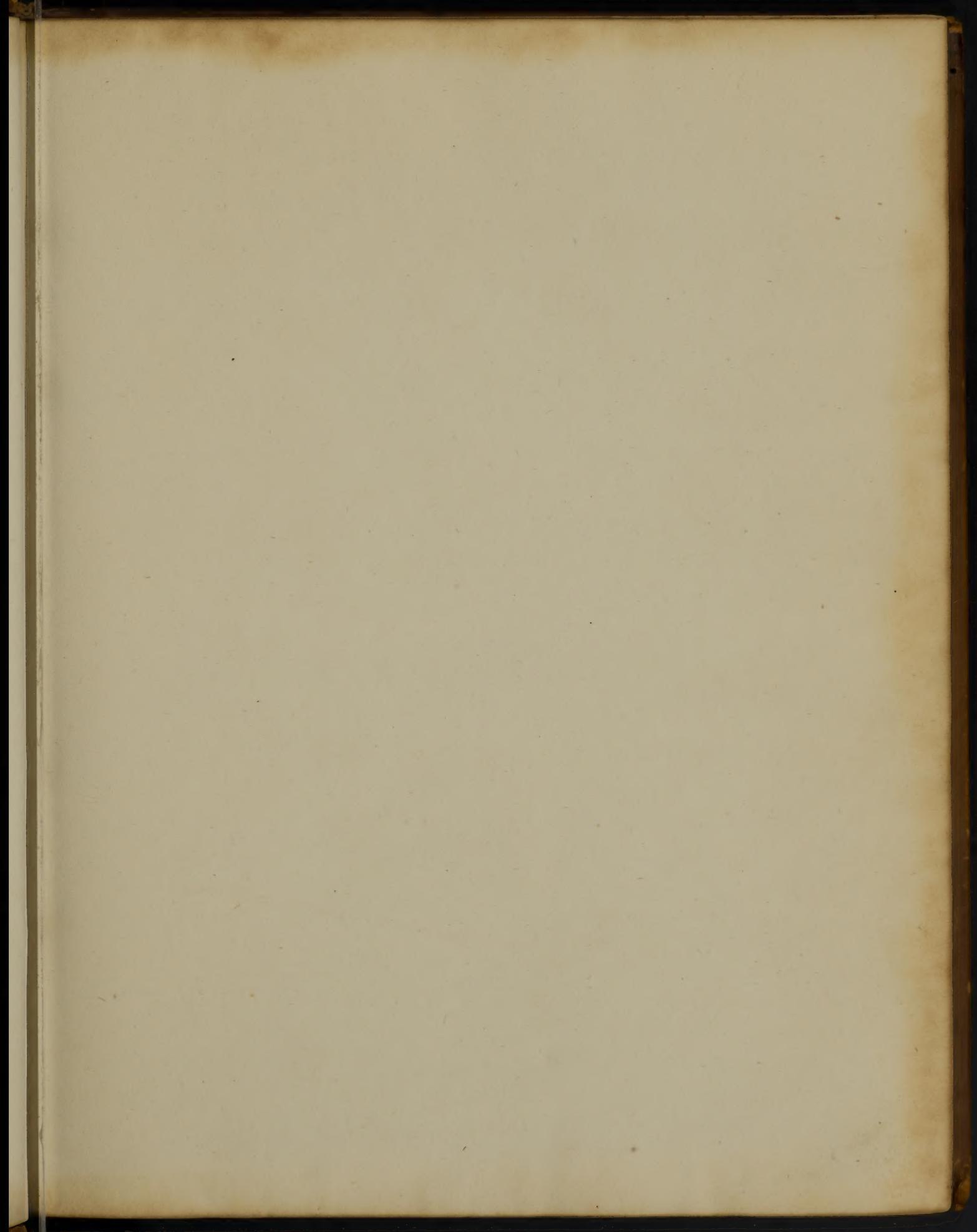


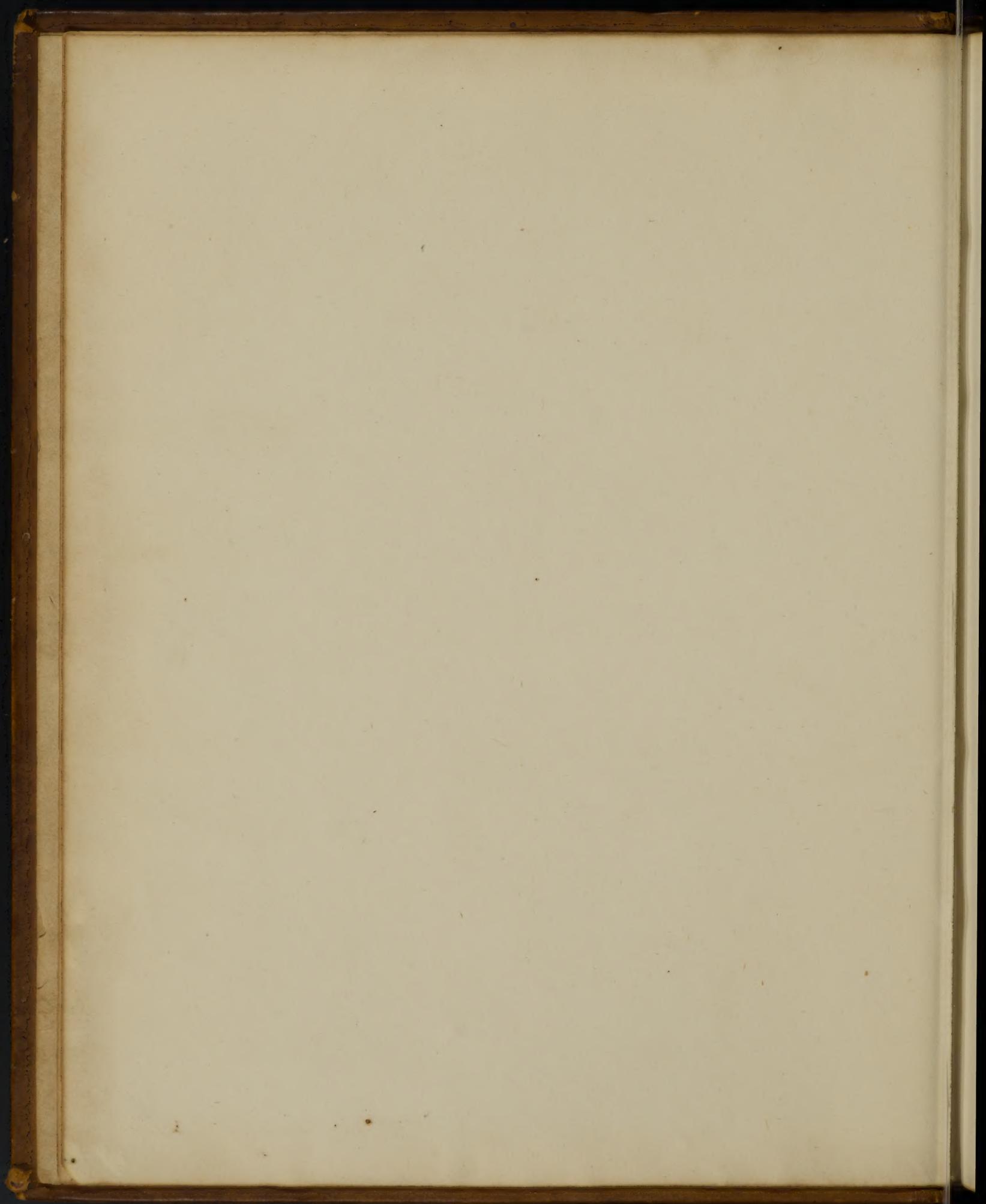


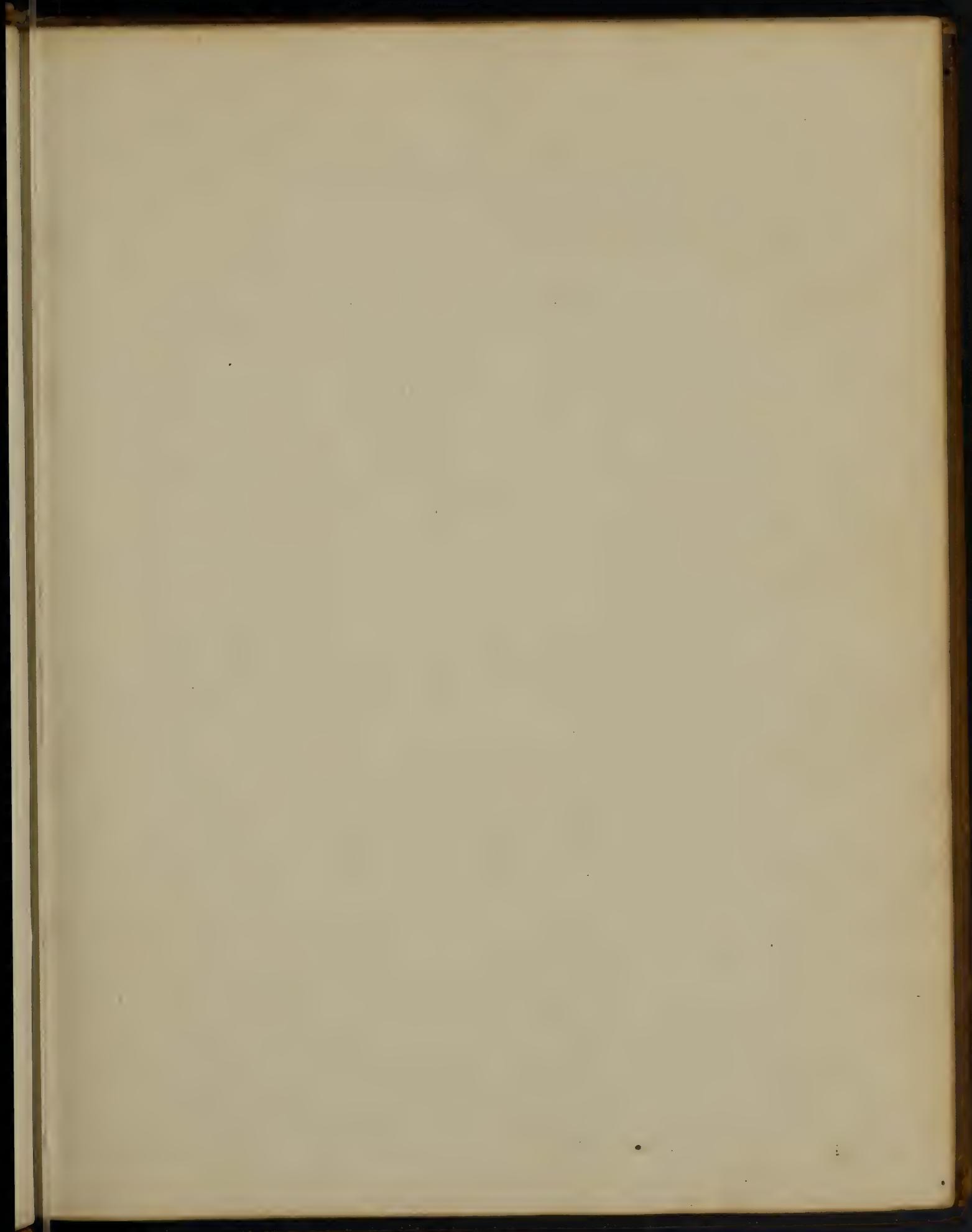


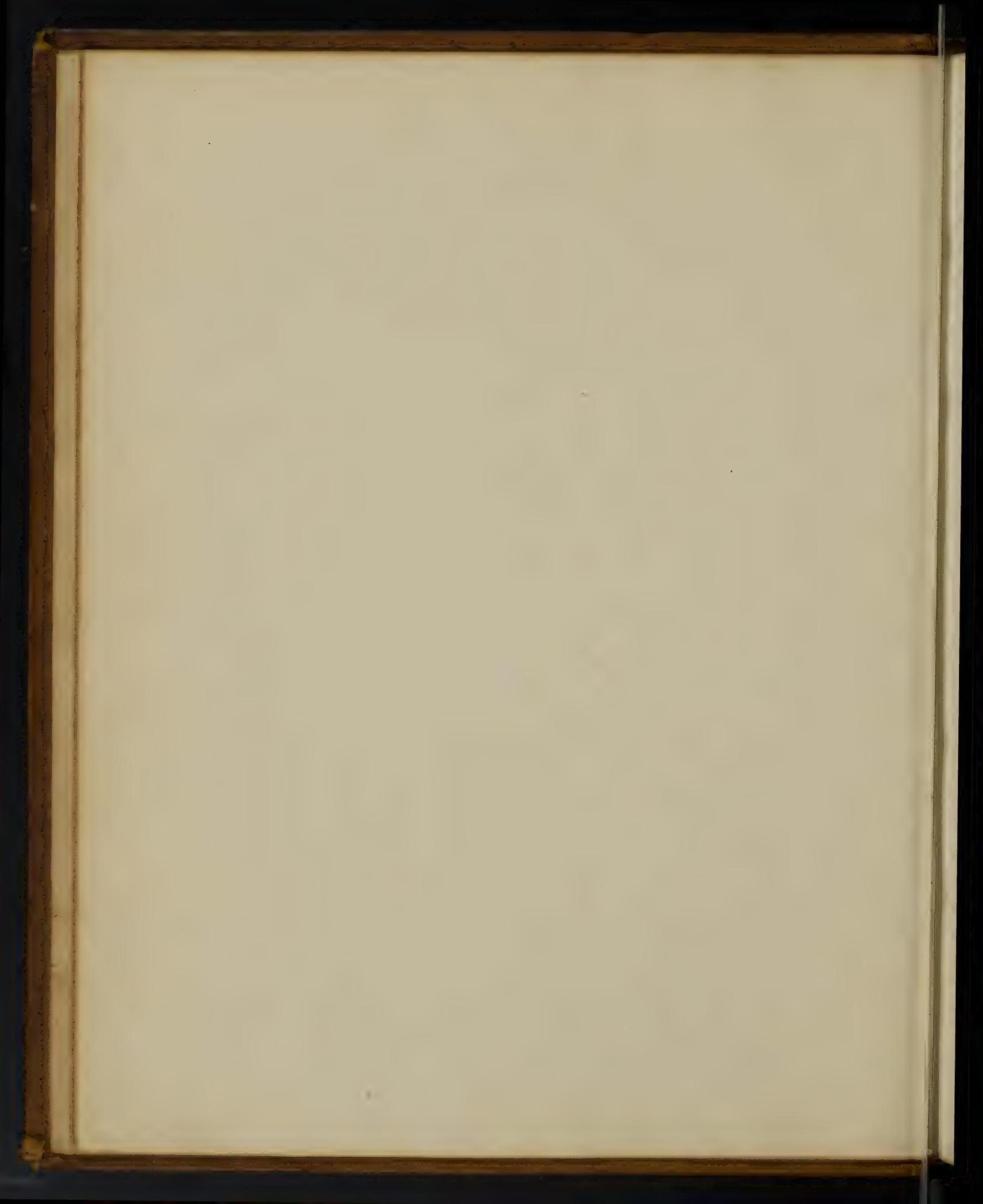


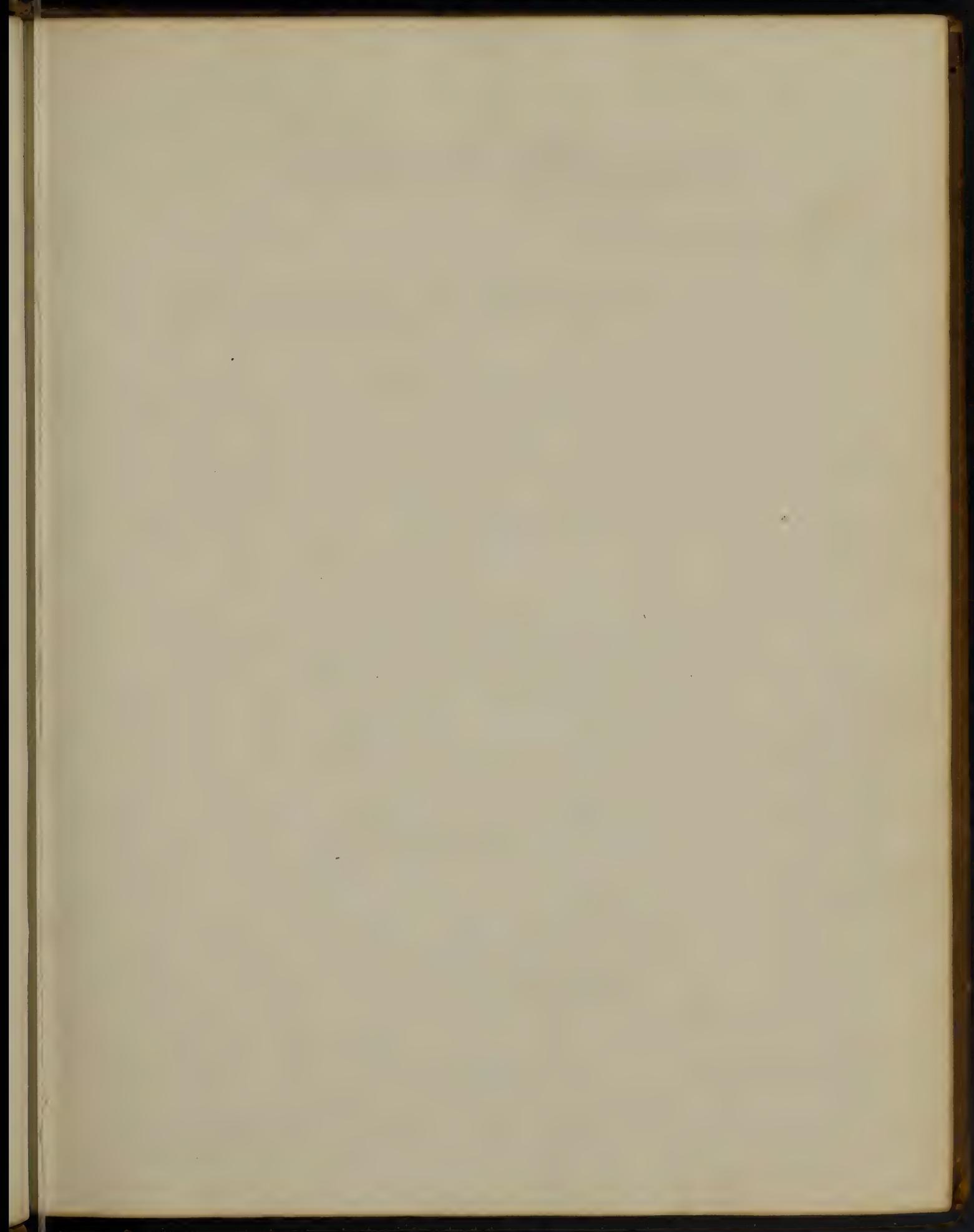












34-833

Private Wrongs.)

By Mr. Gould,

of the Action of Slander.

Slander consists in maliciously defaming a person.

Ist. By words written or spoken which tend to injure him in point of personal security, connections, office, profession, or character. 4 Bac. 488. 4 Co 14. Bul. q. 3 Blc. 173 Esp. 496.

IInd. Without words, as by figures pictures &c. of the above tendency. Esp 496. 3 Blc. 125. 5 Co 125.

Committed according to the usual division in three ways.

1. By writing. 2. By words. 3. By signs pictures, &c. &c.

True Slander or Blasphemy by words is of 2 kinds. 1st. Of words in themselves actionable, - 2nd. Of words not actionable in themselves, but becoming so by means of some special damage, according to person of whom spoken in consequence of them. 4 Bac. 483. 494. If the judgment of law words actionable in themselves are abstractedly injurious, then, for the p^t in his Declaration, n*o*, State no special damage to himself, in consequence of them. But when the words are not in themselves actionable, but become so from some supervening cause, they are not abstractedly considered in judgment of law injurious; therefore till in consequence of them some special damage has accrued to the person of whom spoken, he is entitled to no action; then

the mere state e. g. special damage proved, it will always
*The words which tho' this title come within them, although not prominently mentioned, tell. The rest are copied verbatim from the notes. Gould, 7. 1800.

Private Wrongs.

Slander.

The Slander rules relative to oral Slander, are fully
written (^{4th Edn.} Post.) Part.

1st Of Oral Slander.

According to the definition, Malice and Malice must
concur to constitute Slander - Malice what.

General rule: That.

Four words in themselves actionable if they may recover
on merely proving the words; for damage is implied. This
is a general rule but there are some exceptions; and such
words prima facie import malice. But this presumption
of malice may be rebutted by proving that they were
spoken under circumstances, which exclude the inference
of malice. 4 Inst 483 Rule 6. 1 & 2. argued supported by S. A. 114.

Classes of actionable Words. 1st Those which bring
the person whom spoken to into danger of legal pun-
ishment. 2nd Tending to exclude him from Society. 3rd Inju-
ring one in his trade or profession, 4th Tending to injure one
in his office. Final 2. 185. 3 Inst. 123. 4 Inst 483. 490.

IInd Bringing into danger of punishment. If the false
words charge a fact which (if true) would incur capital
punishment, the words are clearly actionable. E.g. charging
a man with Treason, felony, forgery. Lawyer 1st 46015.
4 Inst 483. Cro 638. 602. 609. 1 Inst 65. 6. 49. 637. 120. 677. 186. 46020
Cro 1st 114.

According to this classification words may be ac-
tionable per se, tho they do not injure one reputation
but may injure ones reputation, but it not be actionable.

Words changing what would only be translatable

(Private Wrongs.)

Islands. 3

are actionable. So. to earldom. 4 Inst. 486, fol. 48. Nov. 36.

Wrongs charging what is subject to imprisonment are actionable. Imprisonment being corporal punishment. 16 Corn. 179. 1 Rule 46. C. 15. 38. Salk. 894 & rest. 265. 4 Inst. 486. fol. 60. 187. C. 8. or. 6. 315. Finch. L. 185. 1 Inst. 486 & Salk. 895 denied in 4 Inst. 487. 36 with 186.

In the case in Salk., the charge of keeping a bastard was decided not to be scandalous, tho' the Stat. 18 Eliz. mentioned in Salk., subjects to imprisonment of the bastard is chargeable to the parish. Yet the decision however is consistent with the rule, for ye charge was not that the Child had become a charge to ye parish, nor was it so stated in the plf's Declaration. Consequently it was laid on Demurrer.

Wrongs charging what is subject to a fine, are actionable or not as the fact charged is infamous or not. So decided by yedup. Re. in Corn. Rec. As there may such rule in Eng. ? 4 Inst. 108. Case of Bawdy house. 4 Inst. 487. fol. 265. 60. Yet sumt so, tho' it is not clear.

Opinatioe however lays down ye rule on this basis "that to charge one with any crime wh. makes the person spoken of liable to prosecution is actionable." 1 Inst. 497. he cites Finch. L. 186. Rec. If this proposition is certain by erroneous, & contrary to the judicial decisions, it would give a charge of mere trespass w^t amount to murder, which is inconceivable not the case. 4 Inst. 486. fol. 27. sec. 104. C. 8. 34.

Wrongs charging what is subject to punishment must, to be actionable, charge a criminal fact.

Private Wrongs.

Slander. 3

committed - Charging with civil intentions not sufficient.
Ad 573. Mo 5123. 4 Com. 191. 452 496. Eg. "he gave A. S. counsel
to kill me" &c not actionable. 4 Co 16^o. So "I expect to
see him indicted for stealing" not sufficient. Nut. 18.

So "He is in jail for stealing a horse" not suffi-
cient. 2m. The words of a scandalous impostor hold no suf-
ficient after verdict. 2 Wilts 300^o. Nut. 2. 45p 497.

Adjective words under this head are actionable
or not as they presuppose an act committed or not.
E.g. to call one "Seditious", "Rebels", "Traitorous" &c not
sufficient, not slanderous, for these adjectives only sup-
pose a seditious thoughts, traitorous by intent, & not
an act actually committed. But to call one "Perjured"
is sufficient, for the adjective presupposes the crime committed. 4 Co 19^o. 18^o.

"He is perjured" not actionable unless it be added
"in a judicial proceeding" or "in such a Court". 4 Wm.
484. 4 Co 18. 2m 4. 609 5 Sem. 166.

The rule one "a thief" after a general pardon is
actionable. Pardon clears from guilt. After pardon
he is not in judgment of Law a thief &c he is clearly
made a new man. So if the particular thief
to had been pardoned. 45p 497. 26^o 81. 4 Bac 4. 87.
yel 52. 3 Bac 516. 1. May 22.

Private Wrongs

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So charging one with having committed a crime
of which he has been acquitted, is actionable. 4 Bac 487 fol.
§ 2. over 150. There is no danger of punishment, & that such
cases must stand on some other principle than that of this
tendency to subject yet person charged, to legal punishment,
for by § 2. no criminal act dangers of punishment, causes.

If the words charge a crime which it appears could
not have been committed than are not actionable. E.g.
He has killed A. & is still alive. Esp 498. 4 Co 16. Bal. 5.

But this matter may be pleaded in. That it cannot
be given in evidence, & if so, mitigation of damages,
if the party state him to be alive, in his declaration,
it might be deemed to be. Bal 5. for of principle.

If to the words charging a crime or description not
corresponding with the crime charged be added, the words
are not actionable. E.g. calling one a thief, because he
had committed a certain act which amounts only to a
trespass. 4 Bac 510. 585 fol. 27-8. Sid. 104. 116 Co 51. 674.
4 Co 13. 14. 19. Bal 5. Esp 511. 557. 2 New N. 335.

But charging a crime & the prosecution for
it is barred by the Stat. of Limitations at the time of
the words spoken is actionable. Decided Sup. Ct. Con. 93
Webb v. Fitch.

The words in themselves actionable admit of an in
nocent meaning & his or defendant to show they were used
in that sense. Peak 47.

If the punishment of the crime charged is the
alternative; the words are actionable if the punishment
may be imposed. E.g. charging one with being the

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Actions on the other of a bastard which has been charged
as to its antecedent to his father & is not liable to punishment
unless he disobeys the order of Justice. 1Bac 317.
Croc. 315. 4 Bac 486. Sack 694 4 Bac 487. Cro. 57.

2nd Pending to exclude from Society. 48. to charge
a man with having a contagious disease. Ep. 498. 3 Bac 123.
Croc. I. 144. 1 Roll 44 766. 219. 1 Lev. 205. 4 Cro 17. 4 Bac 488. 1 Com. 488.

But the words to be actionable under this head
must charge a present disease. 2 Stra 1189. 20. 10. 473. Who
formerly, if it were of a past one, it was scandalous. Cro.
219. Cro. I. 430.

Under this head adjective words in the present tense
are actionable. 12. Cro. 248. 4 Bac 488. Cro. I. 144.

3rd Pending to injure one in his profession or trade. Eg.
calling a Lawyer a "Liar" is actionable. 4 Bac 490. 1 Com.
182. 26. 498. 3 Bac 123. French L. 186. 1 Roll 52. 6. 35. 536. 5. 15. 52. 54
1 Com. 182. 2 Vols. 28.

So "He has revealed his clients secret." 1 Roll 57. 650.
1 Com. 182.

So "He is no Lawyer", no more a Lawyer than the
Devil. 1 Roll 54. 3 30. 6. 59.

So in general charging a Lawyer with ignorance
in his profession. Cro. 382. 6. 275. 1 Lev. 297. 186. 52. 1 Roll 54
4 Bac 491. 2. 1 Com. 182. 2

In these cases however the Lawyer must state in
his defence, that at the time of the words spoken
he was a practising Lawyer. States 231. 4 Bac 491. 2 Com. 218
207. 4 T. 10. 366. Proof of his acting as a Lawyer held in sufficient
favour. 4 T. 10. 366. 2 Cro. 230. 487.

Peculiar Wrongs.

Standards

To falsely calling a trader a Bankrupt is actionable. To "He is a Bankrupt. Marry". To "He will be a Bankrupt in two days". 4 Bac 192. 2 Stra 762. Cope 499. 1 Com 183. 4 Bac 492. 2 Com 299. Barth 330. 1 Rose 61. -

To charge with cheating his (ridiculous) trading is not to deal with him is actionable. 4 Bac 492. 2 Com 62. 2 May 1490. 1 Com 183. Barr 1688.

In actions by Tradesmen in these cases it must appear by laying a colloquium, or otherwise that y^r words were published with reference to his trader. 4 Bac 492. Wall 694. Stra 646. 1169. 5 Mod 398. 1 Ray 61. 169 2 L May 1417. Eg. "He is a cheal", here a colloquium concerning his trader is necessary to be laid. But if the words were "He is a Bankrupt." it w^t be sufficient. (Supposed merely to aver that he was a trader &c.) 1 Law 115. 250. 4 Bac 492. 2 Com 62. -

"Do not deal with him, he is a cheal" if you call out a colloquium. 2 Com 62. [It is not necessary to lay a colloquium, whenever from the words themselves it is inferable they were spoken of the trader or that they were spoken of his trade]. -

To call a Clergyman a "Scar" has been decided to be actionable in 14^o S^t C^t in Com. & that decision was affirmed by 1^o C^t of Errors. Bacchus v. Bishop. -

In Eng^t to charge a Clergyman with preaching lies is actionable. 3 Law 17. 1 Com 181. 1 Rose 58. 36. -

To so call him a "Drunkard". 4 Bac 490. To other points as calling him a Scogue. see Comp 259. Stra 946. -

To call a Physician a "Duck". is actionable. 1 Rose 54. 1 Com 182. To say "he has killed a patient" said re-

Private Wrongs.

Slander.

to be actionable. (See E. 620.) unless it be added "knowing"
by" - "wilfully" or the like. Justice Finch was opposed to
the decision. And the correctness of yr. decision may
be questioned as it supposes ignorance in his profession.
4 Bac 491. 11 Mod 221. If Deceit, not so would by the decis-
ion in Moderna & Fa Mod Supra. Where yr. same words S.
of an Apothecary were adjudged actionable. Rule as to
Lawyers Supra.

With regard to Mechanics it may be laid down
as a general rule, that any words tending to injure
a Mechanic or his trade are actionable. 4 Bac 491. 2 Stra 598. -

45th Tending to injure one on his office. Words
charging one in an office of profit, with want of abil-
ity or integrity are actionable. 4 Bac 488. Ebd. 500. 2. 2 May.
1296. 1 Rowl. 180. Saltk 695. 14. 2. 65.

But words charging a person on an office of trust
or honor, not of profit, with want of ability are not
actionable. 4 Bac 489. 4. 38. pl. 73. Saltk 695. But a charge wh.
impeaches his integrity is actionable whether it be made
to a man holding an office of trust. Honor or W. one holding
an office of profit. Saltk 695. Stra 617. 2. 2 May. 1359. 4. 6. 16. 7. 6. 140.

The reason given why a charge of want of suffi-
cient ability when made to a man holding an office
merely of trust. Honor is not actionable, is, because
a man cannot help his want of ^{official} sufficient ability.
But does not this reason apply equally well
to such a charge made to one holding an office of
profit? At least does not Judge Rowl. tell you he
think that as it goes off the action in all other
cases.

Private Wrongs.

Mandat

case of slandersous charges made not even on office is the tendency they have to injure; it is a charge of want of ability has as great a tendency to injure, as a charge of want of integrity, therefore it ought to be equally actionable. Consequently when the distinction is considered one on principle. St. Alb. P. 7.

The distinction is clear in the Books however, & this: you calling a Justice of the peace "a bullet headed Justice" is not actionable. If the offer of a Justice of the peace is considered as one of mere insult. *St. Alb. 695.*

Charging a person on office, in either case with inclinations and principles which disqualify - sufficient without charging any act. *St. Alb. 5.*

Colloquium. When the words spoken do not of themselves import to have been spoken with reference to the official character, a colloquium is necessary. Thus if one speaking of J. S. in his official capacity of Just. of the peace, says he is a knave, meaning that he is a knave in his capacity of Justice, the charge is actionable, but the words must be couched with the colloquium to show that they relate to the official capacity of the plff. *P. L. Ray. 1364. Stu. 618. 4 Bac. 489 pl. 88. 2488 pl. 74. 12. 280.*

But if the words themselves do import a reference to J. S.'s official character no colloquium is necessary to be laid. e.g. "J. S. is a knavish Justice." *Cro. L. 58. 7. 12. 280.*

And it may be laid down as a general rule, *Tayl. 64*, that to all professional men, to traders & mechanics as well as to men holding offices; that when the words spoken are not in themselves actionable, but as they relate to some collateral thing which constitutes the ground of action, to which

"Private Wrongs.

Blander,

the words themselves do not upon the face of them appear, an averment of a collegium is necessary. E.g. So say of one who is a trader "He is a cheal". Colloq 308. 2. Hand 307. Esp. 501. 2. Sec. 1184.

Colloquium said by Espinosa (514) to be necessary where a Trader is called a Bankrupt. So authority cited by Espinosa t. 500 1. Sec. 280. When the words were "He is a foreworn Justus" & colloquium holden unnecessary q. Bac 515. pl. 35. So calling a physician "no Scholar". 1160. 54. Coro Sec. 270 or 196. 4 Bac 515. pl. 35.

(t. 500 1. Sec. 62) saying of a Tradesman "Do not deal with him he is a cheal". Colloquium holden unnecessary.

So "he is a knave, compounded with his Creditors" so Colloq. holden not necessary. 5. Reg. 1480. 4 Bac 513. pl. 36. 515. Coro Sec 240. Esp. 502.

Of Imwendoes.: If the words themselves do not show their own application by designating in express terms, the subject matter, or y^e person, imwendoes are necessary. E.g. He (meaning the p^tff) t. 4. 6017^b.

It is a rule laid down by Codex that "nothing ab. w^t otherwise remain uncertain, can be rendered certain by an imwendo. q. Bac 516. 4 Co 17^b. This rule is not accurate, for if taken literally an imwendo w^t be a mere nullity. The rule thus laid down w^t be more accurate; any thing, which taken in connection with all that passes before, between the parties to y^e conversation, remains uncertain, cannot be made certain by an imwendo. It can make certain only by a reference to something said t^e before which is certain. 4 Co 17^b. 1160. 73. Esp. 684.

eg a imwendo can then not never extend y^e meaning

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Planter

3

of the words by yous Chir proper import. E.g. I. S. barn or my Barn (meaning a Barn full of corn) - in meundo not good. But if it had bin averred that Doff had a Barn full of corn, & that in a discourse about that Barn, the Doff spoke the above words, ye. in meundo w^t have been good. (Conf 684.276. Esp. 511. 4 Co 20. Toto £. 834.-)

So "He stoles half an acre of my Corn" (in meundo - "the corn which grew on half an acre after it was reaped") in meundo bad. (Toto £. 428. 1 Moce 82. pl. 1. Conf 684.

When an in meundo is unnecessary, a bad one is superfluous. E.g. "He was perjured" (in meundo - "in a certain case exhibited in such a Court") in meundo is bad, but the 16. declaration is good. 4 Bac 516. 1 Moce 83. Cno £. 609. So "he has given over himself" (in meundo "in such a Court") in meundo importinent. -

So if the person is an alienor from y^t woods published, an in meundo cannot make certain. E.g. "one of the Servants of J. P. is a thief" (in meundo "the people") this in meundo is not good. Esp 511. 4 Co 17. 1 Sid. 32. Toto £. 497. Hob. 2. 45-

Thus far as to in meundos. I shall now return to ye subject of words tending to injure one in his trade &c.

If now an action is brought for words tending to injure one in his trade, profession office &c. it must appear in ye declarat. that ye p^tle^s was at y^t time of y^t words spoken at such a trade, profession office &c. Esp. 514. Note. 49. That "Doff has bin a trader, merchant &c for many years past" not sufficient. Cno £. 799. 3 com. no judgment - See £. 205. - Powers contra, which say he shall be presumed to have bin a trader. ut y^t times see 4 Bac 513. Cno £. 278. Yelw. 159. Cno £. 222. 61 C. 282. 1 Sid. 428.

Private Wrongs.

Flanders. 3

From this it appears that it is a law what am-
ong is necessary to show that present quality. The cri-
tique however seems to be that it is fully appear in the
declaration that y^e p^t. was a present trader; it is self^e-
but that must fully appear in the declaratⁿ may be
denied to. But as to what amounts do make this
law fully appear it is perceived there are (supra) ma-
ny contradictory cases.

So in case^r of a trader it is necessary according to the
Eng^r Law to aver "that he gains his living by buying &
selling. Esp 518. 150 299. f. Deu. n^r? This be necessary in U.S.
when it is settled that a trader, some who gains his living
by buying & selling, are synonymous.

It is laid down in some of the Books that words of heat
& passion, are not actionable. Esp. 520. 413a-522. 12v. 49. 313c. 185.

The meaning of this rule is not explained in th. Book,
it must not however be taken literally. But y^e rule
is this, when they import no definite charge, as "Rogue" "N^r
lion", Rascal" &c. they are not actionable. Then effusions
of heat being more vague terms^r. So perhaps when evan-
only provoked by p^t. they are not actionable. But se-
c^rs of Dife or a passion of unprovoked are other
actionable words. 2 c 8 in R. 335.

Of the Construction of Flander.

The rules of Law upon this subject have been at
different times entirely different. In ancient actions of
Flander were very rare. But in the time of James I.
they had become very common even for trivial charges.

Private Wrongs.

Slander.

To curtail this except a Stat. was passed in y^r 21. James.
That in all actions for Slander & defamation where
the damages given did not amount to 40^s. the plaintiff
recover no more costs than damages. This Act, actuated
by the same spirit of prudence as often the mode of
construction, called the construction in mitiori sensu,
a construction which gave the slanderous words, if it
c^r possibly be done by any straining, twisting, or too
twisting, an innocent meaning. Under this rule of
construction the tongue of slander might inflict its
wounds with impunity. The probability of recovering,
in an action of slander, became so extremely slight
that but few were hardy enough to commence one.
The St. afterwards observing the hardship, injustice,
absurdity of this rule of construction, went into the
opposite extreme, & tortured of possible, the words so
turn into a criminal & dangerous meaning, & adopt-
ed the construction in severiori sensu. The injustice
of this mode of construction was soon felt, & became
ameliorated by degrees to its present standard. Therefore,
The rules of construing words in mitiori sensu and
severiori sensu are now exploded. They are to be taken
in that sense in which they w^r naturally be understood
by y^r hearers. Esp 511. 4 Bac 497. Cowp 688. 2 S. 4 Bac 505. Bul 4.
10 Mod 198. Kirby 12. Peak 4 n. 2. Mod 159. 3 N. L. c. 8. P. 1061. 5 East 463.

When words in themselves actionable, admit of an in-
nocent meaning, it lies on Df^t to shew that they were used in
that sense. Peaks Cas 4. 2 New 12. 335. Non. 507. Johnson 274. 2 St. 180.
Hearer is not exequatur of how he understood them. scmb.

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Slandorous words in a foreign language, actionable if understood by any of the hearses. Sectus Not. 4 Bac 448.
1 Roll 74. Cro C. 865. No. 126.-

All the sentence is to be taken together. Esp. 511.-
The following words may explain the former, so as
to fall short of Slander - as in case of us a description as -
this (ut supra). 4 Co 14^a. Bull 4. 2. 1. No. 139.

Court will not do violence to language to give
an innocent meaning. Esp. 512. e.g. "You hast and
did of a wound you gave him". Sufficient - tho the
wound might have been given by accident. Gibb.
Rep. 243. Ball 4.-

So a factual construction will not be given to make
words actionable, which bear an innocent meaning.
Esp. 512. e.g. "He is a common maintainer of suits" of a
Lawyer. No. 117.

It is a General rule; that the words must be actionable, injict a direct charge of a slanderous
nature. If the charge can be drawn from the words only
by inference they are not actionable. Esp. 512. E.g. "I. S.
got his manor by swearing & foreswearing"; not ac-
tionable. 4 Co 15^a.

yet where the intend to charge a crime, or any
thing else of which the charge is actionable, is clear
the words are actionable, tho' somewhat indirect. . .

1 Roll 49. C. 45. Bull. 160. E.g. "I will make you an ex-
ample for a injured Person". Esp. 512. Ball 4. 1. Com. 185.

So "I will prove that he poison'd A. S." Com. 185.

1 Roll 50. C. 1. 5. Cro E. 569. 1 Sid 381. 1 Bent. 276.-

Pirate Wrongs.

Slander,

So "Who will you return the ship you have stolen?" has been decided to be actionable. 1 Com. 186. 1 Mo. 42. 2 Roll 165-
12 Co 134.

Of the Pleadings.

It is laid down as a general rule that "Falsity" and "Malice" must be averred - or in other words that the charge must be averred to have been made "falsely and maliciously" in the Bulk: in an action of slander. Mala-
ciously seems not necessary, for malice is prima
facie implied. 1 Com. 196. 4 Bac 512 pl. 8. 1 Kibb 273 May 35
own 51. (Ques. if the words are not in themselves actionable?) - A direct averment that the words were false not necessary. "Falsity published" sufficient. Est 516. Bull 3.

The Bulk usually states that the plff. is of good fame & reputation &c. It is not necessary. 1 Com. 195.

The form of declaring in an action of slander is, that the words were "uttered & published;" & to support the action it is necessary that the words shd. be uttered & published. Now alledging that the words were spoken "openly & publicly" is sufficient without saying "in the hearing" of such & such persons. So alledging that the words were spoken "in presence of divers persons" is sufficient. 4 Bac 512. Cas 2. 861. 1186. 2 May 37.

Malice what.

Picule Wicnys.

Slander. 3

The in general actionable words prima facie
imply malice, the presumption may be, by circum-
stances rebutted. e.g. In case of confidential communica-
tions, which relate to the probability of malice.
As the character of a servant given by a former mas-
ter or mistress, or reasonable enquiry, the false, mai-
lice must be proved. 41 Hanw 2422. 12. 13. 110. 13. & 14. P. 8. Coro
Jac. 4. 60. 41. 45p 26. 502. 3. 5. 86p 110. 110. 31. 13. 805. 8. 7. 6. 8. 493.

So where one confidentially by way of warning to
another said of a trader "He will be a Bankrupt soon";
you had better not deal with him". The words were held
not actionable. The species down-ages were stated & the
affections were taken yet the circumstances precluded
that it was presumed not maliciously. 45p 503. 13. 8. 10. 8
3. 12. 60. 61. argued

No of words used in the course of legal proceedings.
e.g. Allegations in articles of the peace. 75p 503. 5. 9. 10
if ye Et applied to has no jurisdiction of the matters
charged. 4 Co 14 Corw 8. 230. (Dec. 1 Sand 131. 2 Bar. 807.) case of Mr
miss. S. C. (is apologize. 25 Buls 249. Nutt. 11.

Of Retailing of Slander. 3

It is a general rule that the retailing of slander
fabricated by another is actionable. 75p 517. Nutt 10. 9. 10
if he truly name his author at ye time. 12. 6. 13. 13. 134
Corw 600. 3 Buls 225. 7. 10. 8. 17. 2. First 426

These circumstances are capable to be regarded
as to the intent. 4 Tab 1498. If though intent & motive may
be such as to destroy the presumption of malice tho'

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the words were false & in themselves actionable, thus forming another exception to the General Rule, that words in themselves actionable are prima facie malicious f. t. g. where one in the spirit of concern said "I have heard that J. S. was hanged for stealing" &c. No action lies. 12 R. v. 182. 460 14. Bull. q. 10.

Defend's suspicion no justification, f. tho they arise from even so probable grounds - e. g. of words in themselves actionable f. C. 318. 610 C. 38.

Words exhorting by prodding or provoking questions by the person of whom they are spoken will not support an action tho they be otherwise actionable in themselves. 4 18a & 4 198 C. 297. E. g. Do you say I am injured? Justice Yes. if you will have it.

Of the General Issue.

The General Issue is in Eng. a denial either that the Df. spoke the words or that they are actionable for want of malice; as in the case of confidential communications. supra 10 T. N. 110. Bull. 8. Esp. 573; 517. 1 Law. 82.

In Conn. the General issue includes all defenses, even that the words were true & otherwise justifiable, except such as are known some act of the p. c. amounting to a discharge of which p. c. to avail himself must, clear specially t. -

The General character of the p. c. as to the crime charged by the words may be proved in mitigation of damages. Wool 354, 430. But other particular acts of the same kind as those charged cannot affect the charges of particular acts. Bull. 256. Parker v. 46; Almon v. Almon 1807 (see under this last) is general.

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In Eng^r a special justification can't be given on Evidence of the time of the Slander. Esp. 518. (In Law it always may) & o^r that y^e words were true, cannot be given on Evidence under 43. Gen^t issue. 4 C^o 16. 560125. Star 1200. Aug. 8th.

In Eng^r: the truth of the words can not be given on Evidence even in mitigation of damages. Star 1200 Esp. 518 Bul. 8th q. 80 cited contra. of the y^e same person that it may not be admitted to overturn the action, viz: that as the pl^t must be ignorant of the L^d s intention to make such a defence he is not prepared to meet it, therefore it is not allowed.

Of the Justification of Slander.

The truth of the words is always a good justification. 4 B^o ac 516. 1 Note 87. Bul. 8. q. cited contra.

So sometimes D^{c_o} may justify, tho' the words are in themselves actionable & false. As when false words are published in a course of justice, e.g. in the Declaration or complaint brought by D^{c_o} ac p^l. 4 Bac 518. 499. 1 Com 194. Esp 523. 4 C^o 14. P^l 8. 230. 248. Hob. 82. Holton 1130043. 1 Note 43. Or in articles of the peace, vide 3 Esp. 32. words used in giving charge of another to an officer. (This is on the ground of public policy, because it w^{ll} have a tendency to prevent the administration of justice if for words exhibited Corum judicis in a course of Justice the party publishing the charge were liable for Slander if in the result the words were false.)

But if the party charged犯 does not cognizable by the jurisdiction to which they are exhibited passing of a writ before the County Court, an action lies not.

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- it is no justification. Eg 543. 4 Co 14 S.C. Chs 2. 230. 248. Hob. 267.
206. 1 Roll 34. 1 Com 194. Of their scandalous quality, it is no
justification to plead they were exhibited in a declaration
or Count, for where charges are so exhibited to a court, not
having jurisdiction it is done coram non judicis. See Quere
on 2 Cut. 1871. 1 Haw. 18. 1 C. 73 § 8. 1 Sand 132. Note 1. Cro 9432. 5 Esp 10109. 10. n.

So, on the other hand, the person charged in such declara-
tion, or articles of complaint, (the they were exhibited under
oath,) may justify, saying that the complainant has sworn
falsely. For this is in his defense in a course of justice.

4 Bac 499. 5 18. 11 Mo 87. 2 10 Mer 807.

So he may say that a witness is perjured by way of
objection to his admission. 1 Com. 194. 1 Roll 33.

Scandalous words in a complaint to a grand jury, or
proper magistrate, or in an indictment, not actionable.
4 Bac 499. Cro 8. 247. 3 8 Com 138. 4 Co 14. Hob 6. 82. 5 Esp 11. 32.

So of words used in a petition to the Legislature for re-
draft of grievances - delivered to the members only. 1 Gans 131.
2 Town 610. 1-5 Esp R. 119 n.

So of words used by way of defense, by a person accused
before a Church presbytery. 5 Esp 110. n. 1 Binney 178.

So of words used upon pronouncing the sentence of a Court
marital. E.g. that the charges were false, malicious & ground-
less. This is no libel. 5 Esp. 110. n. 2 c 8 Mer R. 341.

Also if one, publicly & maliciously & without probable
cause exhibits a complaint, bill of indictment, &c, for an action
for malicious prosecution, well lies of who he is not main-
taining an action for Slander. 4 Bac 300.

It seems to be a general rule that in the above cases

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if complaint &c. if the course of justice is made a mere cheat
for malice an action for malicious prosecution lies. Scrb.
4 Bac 500. 3 Bl. 126. Finch. L. 305. M. & B. 116. Qu. as to
juries. Vide ante.)

So it is a general rule that scandalous words spoken
by a witness in Court are not actionable. 4 Bac 499. 518.
C. & S. 230. 2 Buls. 269. Holton H. That he is liable as if case
may be for perjury. Sees, if he goes beyond the issue and
slanders a third person. Esp. 504. 4 Co 14. Suppose that he so
slanders a party. Is there no remedy?

So if one witness in testifying charges another with
having testified falsely - no action lies. Esp. 505. 518. 1 Daud.
181. 4 Bac 518. 1 Com. 194. 2 Burn. 807.

When by Counsel in an Action.

So that the words were spoken by legal as counsel
in a cause, is, in some cases, a good defense or justification,
in some not so. 4 Bac 518. 498. 4 Ball. 10. Cro. I. 91. 5 Esp. 10. 110. n.

Rule of distinction: When the words (the facts etc. are
pertinent to the cause & suggested by his client, he is not liable.
Esp. 517. 1 Com. 194. 4 Bac 498. 518. Cro. I. 40.

But if the words are impertinent (the suggested by his
client) - or if being pertinent they were not suggested by
his client (Qu. as to this latter clause) - action lies w^s. Lin.
3. Bl. 29. Cro. I. 90. 91.

Most of y^r Books however make no difference between this being
suggested by y^r client, not suggested. Bul. 10. esp. 517. Roll. 87. L. 25. 1 Com. 194. Roll. 88.

Pecuniary Wrongs.

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It has been decided that for the purpose of mitigating damages in favor of a client, an advocate, may use slanderous words more pertinent to the cause. P.C. Dec. 4 1844. 498.
Hob. 328. 1 Roll 87. l. 10.

In a subsequent case (Stra. 462. 4 Recd. 498.) it was held that an advocate is never liable for slanderous words in defending his client's cause. It is his duty - it is presumed that he was influenced by his client. Dec. (Late writers do not mention the two last cases.) These 2 rules give a counsellor a great latitude of speech, or slander, indeed it appears pretty evident that they are not law.

When there are two counts, one charging actionable words, the other, words not actionable, & on a plait to the whole, entire damages are given judgment, will be arrested so some damage awarded. 8 T.R. 564.

Accus if the words are all in one count. (10 Co. 130. 360d. 177. C. E. 302. 788. Stra 1099. 1 T.R. 508. 532) unless in count 2 they are laid to have been spoken at another. 15 & 16 Vict. 2 B&C. 7. Root 346. 4 33. 1 C. 131.

15 Private Wrongs

Slander,

Of Words not in themselves actionable

In actions for words, not in themselves actionable, special damage must be stated - this is the gist. And he must prove the special damage on trial or he will fail in his action. This special damage is the gist of the action, till it is necessary that they should be stated & proved, because the law does not give slanderous words not in themselves actionable, implied damage, as it does from words actionable in themselves. For the principle see, Esp. 520; 8 T.R. 130. Note 6, 7.

So when the words are actionable the plff. may state & prove special damage; but in this case he can prove nothing or special damage than what is stated specially. (Bul. 7.) So he may prove general damage as loss of customers in general, such general damage being laid. See Bul. 7. Esp. 520; 8 T.R. 133. Note 38.

What amounts to an allegation of special damage
Stra 666 Bul. 7 Kirby 65. 290. 8 T.R. 130. Note 58. 4 Co. 396. Note 4. 4 Co. 949.

But when the words are not in themselves actionable, holden that special damage might be proved under an account of general damage. Stra. 666. 16 Com. 198. - See by Bul. 4 P. 7 Kirby 290; Esp. 520.

It is immaterial what the false words are, if they are malicious to occasion special damage. E.g. calling a single woman incontinent, will bring a suit by which she loses a match. 4 Bac. 496. 4 Co. 17.

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Slander,

Of Slandering a Title..

In case of slandering a title (as it is called) as calling an heir apparent a bastard, it is sufficient to show remote or probable damage. Esp. 501. Cro. J. 213. 4 Co. 17. 4 Bac. 494. 1 R. 6638.
e.g. if his father had signified a design to disinherit.
Sufficient also that the words tend to disinherit, so decided in favor of the young & sole son. 4 Co. 17. Esp. 501.

No action lies if the party claimed the title as his in equity.

The recovery of damages is a bar to another action for the same words, whether the words are actionable per se or not. Esp. 519. Bul. 7.

Of giving similar words, in evidence.

It was formerly necessary to prove the words precisely as laid - it is now sufficient to prove the substance. Bul. 5. 2 R. 6638. Esp. 521. That the same manner must be the same. Esp. 521. 13 M. 5. 4 T. R. 217. 8 T. 16 150.

In actions of slander in general, the plff. after proving the words stated may give evidence of other words of a similar kind, spoken at another time, soon after, or long before: as for this reason (it is said) "to be in aggravation of damages." Esp. 518. Bull. 10. *ca. citio.*

But this cannot be the principle, for 1st: words not actionable may be thus proved. 2^d: words actionable (which may also be thus proved) are foundation for a distinction. 3rd: words spoken after action. Best may be this from the true object is to show malice. Bul. 7. Esp. 520. 3a. 8 Bac. 591.
If the true reason was "to be in aggravation of damages"

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it would ^{not} be to give similar words in evidence, that are not in themselves actionable - yet this is often done - but from such words the Law implies no damages. Therefore they cannot enhance them. And when words in them selves actionable are thus given in evidence, it is no bar to a subsequent action upon them. Therefore if they were, when thus given in evidence allowed to aggravate, the damages, there w^{ld} be two, recoverable upon the same right of action, viz. the first when given in Evidence, & th^d 2^d when made the ground of a subsequent action: But an incident attending this rule is conclusive that y^e reason given is not the true one, viz. that similar words spoken subsequent to the commencement of the action may be thus given in evidence; & it is an invariable rule of Law that there can be no recovery on any ground but those which were pre-existent to y^e commencement of y^e action. The true reason then why words are thus admissible, which are not alleged in y^e Declaration, is that the fact may be better ascertained, of those allegations being malicious or not.]

But when words spoken at another time are given in evidence under this rule, Df^r may prove them true to rebut the inference. Esp 518. Bul 10.

Where words not stated or spoken at a different time, are proved, they must be similar to those charged. Esp 520. And the same words only. Bul 10. Words similar Esp 518.

See C. & Conn^t has decided of proving like words spoken at a different time, to other malice. Kirby 151. Spoken many times pro & contra.

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The English Stat. of Limitations as to Slander is 2 years, from the time of uttering it. The Stat. relates only to actionable words. C. p. 519. 12 Edw. 9^o.

The Count. Stat. limits the action to three years. It does not extend to words not actionable.

It was formerly necessary in this action to prove the words precisely as laid. It is sufficient now to prove the substance. The manner must be the same, the persons of pronouns must not be changed. Rule 5. 2 Rule 718. C. p. 521. 4 St. R. 217. 8 St. R. 100.

Two persons can never join in an action of Slander. And this rule applies to all actions founded on private wrongs unless it be for some violation of a public right. Neither can two persons be joined in this action as Dfts. 2 Bur 984. C. p. 502. Bul. 5. 1 Com. 195. Dyer 19.^o 4 Bac 511. 2 Bul. 120. 121. Slander not being strictly a Tort, which supposes an act. Bul. 5. 3 B.C. 117. Vide 1 Com. [To constitute a Tort, some force is requisite, either actual or constructive; but none can be implied, either actual or constructive from Slander. It is therefore, like a private wrong, no Tort.] - J.

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III. Slander by Writing or Libel.

As to the nature of slander by writing: 1^o. Whatever words w^t be actionable if spoken, are clearly so when written. Foot 504. 3 Bl. 126.

But written Slander is a more aggravated injury, as having a more extensive circulation & being always deliberately committed. 3 Blac 490. 3 Bl. 126.

The rule does not always hold & converso. Foot
1^o. St. Estevan aff^r 564 says Slander by writing differs only from Slander by words in this, that it is delivered in writing or printing; and Blackstone says the same rule applying to Cath. 3 Bl. 126.

Perhaps his meaning is that words which if spoken could not be slanderous, are not Slander when written, tho' they may be actionable as being libellous. If this is not his meaning, y^e rule is vicious.

The most general definition of a Libel, is any writing of an illegal or immoral tendency. 4 Bl. 150. This definition is much too general to be adapted to the subject now under consideration, viz; a Libel as a civil injury. A more applicable definition is y^e following
Definition of a Libel.

a ^{any} malicious defama-
tion of a person (living or dead) made publick by
writing, printing or other signs to tend to excite
resentment, or to upon the object of it, to odium, con-
tempt, or ridicule. 4 Bl. 128. 17 Chanc^r 9^c 193. 3 Bl. 480. Foot 150
3 Blac 490: The definition seems chiefly to have been

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framed with reference to Libels considered as a publick offence. e.g. "David" person -- exciting resentment &c. If this definition seems chiefly framed with reference to Libels as a publick offence, it is not to be understood that every writing falling within it is actionable as a civil injury.

For Libel in general. There are two remedies - by indictment, &c. - by action. 3 Bl. 125. 3 Bac 492. 498.

If the object under this head is, to treat of Libel, as a civil injury: somewhat of yo^r law relating to Libel as a publick offence, will however necessarily interfere itself. p.

It is laid down that the General Rules relating to oral Slander apply to cases of Libel, as civil injuries. (2a.) Do the negative rules as to oral Slander apply? e.g. to charges with crimes &c. Cop. 502. 3 Bl. 403. Stra 898. 3 Bl. 126. This rule must be taken with qualification, that the yo^r positive rules applying to oral Slander will invariably apply to Slander by Libel, yet that the positive rules applying to written Slander will not invariably apply to unwritten Slander. For the same words which if written w^t be actionable are, not invariably so when spoken.

But nothing is construed a Libel which is necessary or the regular course of legal proceedings. e.g. in a declaration, complaint, affidavit, &c. Cop. 505. 2 Wm. 80th.

In action lies not for publishing a true account of a trial in a Court of Justice, the publisher's character is injured by it. 1800 St. Rul. 525. 3 Cop. 15. 110 n. 1 Bl. 456. 8 T.R. 293.

In a civil action, the truth of a Libel, as of a riot not written, is a justification. 107 N. 748. 4 Bl. 150. 166. 253. 2. 1102. 166. 1106. 49. 3 Bl. 125. 6. 18. 4. 7. 8. g. Contra once 1062. 4 Bl. 516. 3 Bac 495. 1. c.

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Success on a criminal prosecution - the truth is not a justification. 3 Bl. 125^b. 4 H. 150. Stra 498. 5 Co 125. 4 Bl. 150. - 2. &c. c. 64^a. The falsity aggravates the guilt. 18 C. 2d. 2d. 12. No one is liable for the bad reputation of the person. Libel being a publication. 2. & H. c. 64^a.

Of Publication. It is essential to the constitution of a Libel that it be published. But writing it, originally seems to be sufficient. One dictated by a third person. Esp. 510. 1 Hawk. 405. 5 C. 2d. 163. 2. & H. c. 64^a 642.

What will amount to a publication may frequently be a question.

That privately transcribing it without showing it to any one, is not a publication. Esp. 510. q Co 59^b. But it is evidence of a publication of the Libel to make public. See. also q. first rule, Salk. 419. If Holt in this case in Salk. says a transcriber of a Libel is guilty of a publication. This dictum of Holt is not considered as Law. J.

One composing it - preparing it to be composed - reading it, after he knows the contents, delivering it to others after he knows the contents to an extent to a publication in law. That, to be wilfully or wrongfully instrumental in making it public, is, to incur the guilt of actual publication. Esp. 510. q Co 59^b. 5 Co 125^b 318a. 497. 1 Hawk. 195.

The sale of a Libel, by a bookseller or other is prima facie evidence of a wilful publication. Thus on the booksell. 2. & H. c. 644. Barnard^b 306 318a. 497. 12. Wm. 2d. 454. 310. 510a. 2. & H. c. 644. So of a sale by Prof. Barnard. 12. & H. c. 644. Note it is prima facie evidence of a wilful publication by the Master. J.

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So presenting a Libel, it is *prima facie* evidence of a wilful publication. 2 M. & W. 643. 2186. N. 1038.

So sending it to the press for publication, is a publication in fact, & the person sending it, is guilty of publishing, where it is printed. *Ante* p. 201. Esp. 810.

Showing it in the presence of others, is a publication. Esp. 810. 6 Co 25. 6 Stew. 2666.

But repeating part of a Libel in private, without malice has been held no publication. Esp. 810. 6 Moore 627. 813. 1 Hough. 196. 2 M. & W. 643.

Showing it to the person who is the object of it, is sufficient publication for a public prosecution. Esp. 806. 510. 4 156. 150. 1 Hough. 195. 3 Bac. 497. 8 Esp. 139. But such is not a sufficient publication for a civies action. 6 Hob. 62. 215. 12 Co 35. 1 Mod 58.

If the letter was a friendly reprobation is it sufficient? i.e. for a public prosecution. Esp. 806. 2 M. & W. 201. It would be clearly not actionable. 66.

Of words actionable when written.

Are all Libels which will suppose a public prosecution actionable? 3 156. 125. 3 Bac. 492.

Words written are many times actionable, when if spoken they w^d. not be. 2 16 Bl. 532 arg. 1 Wood & Hale 331. 12 H. 120. 2. 6 How 310. 1 Mod 58. 10 T. K. 752. arg. Stra 899. 3. 13a & 422.

Is it to words actionable when written? The not so when spoken, there have been but few decisions; it has however been decided that of writing & publishing any thing falsely which makes a man odious, or ridiculous is actionable.

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3 Bac 492. n. Wilts 403 180st Rep. 331. And one of the judges (South) held in that case (in writing) that to write of a man that he was a "Rogue" or "Rascal" was sufficient.

So (according to Esp.) where the writing injures the domestic peace & happiness of a family, charging a man's children with immorality or wantonness, it is actionable. Esp. 505. If Esp. here confounds the public & the private right - an action w^t clearly lies in such case for y^r publ. offence, but it is also unclear what more w^t lies in the name of the individual for the private injury: & this is warranted by the case from Mr. Esp. who informed his profession. See 2 Hargr. 807.

Writing or printing of one that he is a "Swindler" is actionable. 18. 16. 748. Secus of 50th Hen. 2. 16. 158. 531.

The [of] Public Office & the [of] service of injury of a libel are considered as repeated in every stage of its circulation. Therefore y^r venue is not changed in Eng. 18. 16. 571. 647. 16. 16. 148.

Tho' the printing or publishing only the initials or one or two letters of the name of the person upon whom it is intended - or signed, names - it is a libel - the manner being such that it must indubitably refer to y^r person. 3 Bac 493. 1 Hawk. 194 Esp. 506. n. Ath. 470.

III. Slander without Words, or Libel with Writing.

E.g. Raising a Pillows before ones door threatening him in Effigy, Esp. 511. 3 Co 125.

Representing one ignominiously by painting: 3 Bac 491. Injunction for this kind of slander it is always necessary that y^r application of y^r hand or be made by imminent & imminent.

Private Wrongs.)

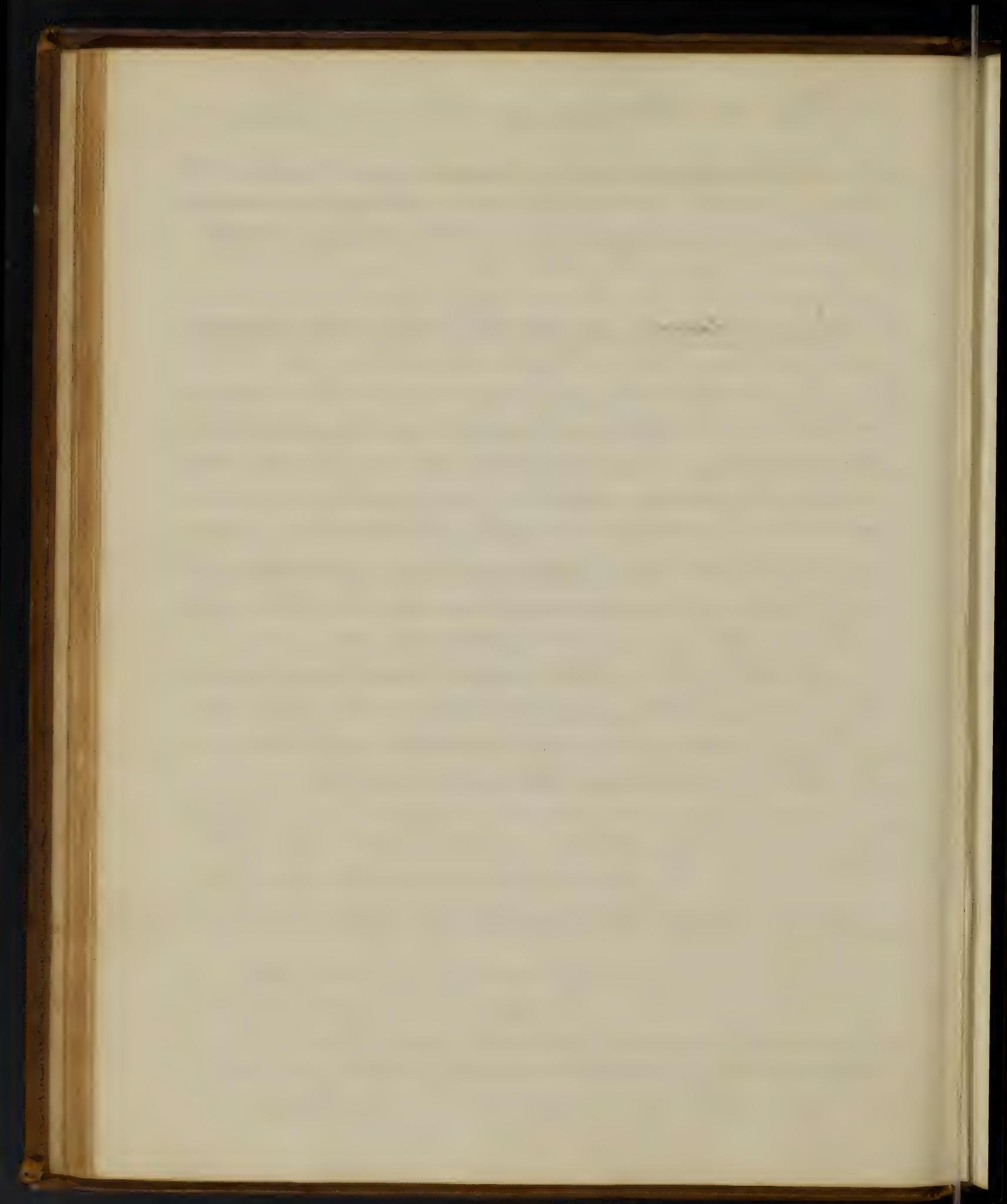
Slander.

The Species damage must always be shown. This kind of Slander is not actionable in itself. Esp. 511. 318. 125. b. Otherwise it is not worthy to be called at y^r. Off.

Scandalum magnatum connecticutensis.

(By our Stat. Law (in Conn.) common Slander is punishable as a public offence. Fines not exceeding \$39. to the County Treasury - Power inflicted. Defaming a C. of Justice or any Magistrate, judge, or justice inspecting their judicial proceedings therein the offender shall be duly convicted by punishment by fine, imprisonment, disfranchise- ment, or banishment, at the discretion of the Court, by which the offender is convicted of Stat. Law. 141..

Mem'rym Connecticut. Legislators have a large pow-
er of Magistrates, judges of Justice in their composition.
Who are careful never to forget that "self preservation"
is the first principle of human action". J. -



Private Wrongs, The Action of Tresor.

This Action originally lay only in cases where one found the goods &c. of another, refused to deliver them over, and converted them. Hence called action of Tresor & conversion. And hence the averment that the goods came into the defendant's possession by finding. 3 Bl. 152. 5 Bac 256.

It now lies in many other cases than for goods found. The action is derived from the Stat. Westminster 2. 13 Edw. L. being unknown to the Com. Law. 1. 31 Henr. 8. 2. 58 12. 2 Ibid. 202. 3. 89. 243. 391.

It now lies by fiction, vs one who tortiously takes the goods of another. 5 Bac 257. Cro. 824 C. 150. This it was doubted. Esp. 589. 1 M. 31. § 123. If it was doubted so late as the reign of James 1st. — The fiction is that he takes lawfully into the possession of the Goods by finding & then converts them, to his own use. And it is sufficient for the P. P. to prove the tortious taking. In these cases, a fiction of trespass is concurrent with Tresor. J.

And this action lies in all cases in which one who is by any means possessed of another's personal goods, sells them, destroys them, or uses them without consent or authority, or wrongfully refuses to restore them, or does any. 3 Bl. 153. Bull. 53. Cro. 781. 5 Bac 256. J.

The first instance of this action in its present form was in the reign of Edward 6th. The actions of a similar nature had been brought in the reign of Henry VIII. 4 Henr. 8. E. L. 526. 385. 386.

The fact of finding is now in material conversion.

Private Wrecks,

Prer. 2,

is the place of the action. "Finding" is generally stated in Eng. 2^d & 3^d Stat. ch. 1. "The goods came into D'st's possession by finding." But it is not always stated in Eng. see Corw. Cap. 87. Bull. 33. 51 Bac. 275. 21 Bulst. 431d. nor is it indispensably necessary, it is sufficient if he states that they came lawfully into D'st's hands. The manner of obtaining possession is but immaterial. Esp. 587. since 33. "finding" is not traversable.

However has superseded to some extent the technicality required in describing, & freedom from a vagrancy. 31 Bac. 153.

OF CONVERSION. The general definition of a conversion is, "A wrongful conversion to dispos. of Goods of another as if they were one's own. 5 Bac. 257. 6 Mod. 212. 2 Bul. 280. 12 Mod. 64.

The before, by fiction, is always supposed to have gained possession lawfully - that the action lies as well for conversion where the original possession was tortious, as where lawful the first being conversion. 5 Bac. 256. 7. Corw. 1. 50. 1 Bul. 31. And this may consist either 1st. in an unlawful taking. 2^d & 3^d Stat. ch. 1. or an unlawful use, 3^d & 4^d Stat. ch. 264. In an unlawful taker. The evidence of conversion in these cases is different. There must be a misfeasance to constitute a conversion. Corw. 528. 5 Bac. 257. 8d. 268. 269. 12 Mod. 65. 1 Recd. 6. A mere nonfeasance never amounts to a conversion, but it may be evidence of it as a denial, or refusal to restore. 12 Mod. 65.

3^d & 4^d Stat. ch. 1. 264. 2^d & 3^d Stat. 468. In example usually given is that of an officer levying on goods held at riskable, but such cases is liable in conversion, & it is sufficient for proof to prove property & that unlawful taking. No damage need be shown of the kind necessary. Esp. 580. 3 Bul. 146.

Private Misfeas.

7 Oct. 3

In such cases Treas. is concurrent with Trover. 3 Bar 265.
2 Stra. 440.

III. By an unlawful user. They suppose that the possession was lawful. E.g. using a thing found daily. 5 Bac 257. 1 Com 220. 221. 6 Co 8. 219. "This is a burning & disposing of the goods of another as if they were his own". 5 Bac 257. Where the taking is not lascivious there must be some evidence of an actual conversion, as in the last following example. Co 10 580.

Misusing a thing entrusted to one's care, found to be an unlawful user; & so a conversion. 1 Com. 221. A carrier of a Box of Goods, breaking open, & selling it. 2 Litt 655. 2 Bl. 312. 2 D. R. 753.

So throwing paper found into the water. Co 8. 219. 3 Bl. 153.

If Bailee of Goods destroy them, trespass, it is said, is concurrent with Trover. Co Litt 57^o. 5 Co 13^b. 2 Hob 555. 5 Com 381. 2 Moor 243. The Bailment is extinguished in Title "Bailment" page

Drawing part of a Cask of wine, & filling it with water is a conversion of the whole. Chp 581. 1 Com 221. 2 Stra. 576. This is a wrongfull assuming to dispose of the goods of another as if they were his own.

But negligent custody of a thing is not unlawful user Chp 580. 390. - it is not a misfeasance wh. I have remarked above is necessary to constitute a conversion. So there is no conversion. E.g. a Winter of Cloth suffered to be moth eaten. Hob. 251. 8 Co 146. Jones 48. 2 May 917.

So if perishable articles are suffered to be spoiled.

Private Wrongs.

Strover. 3

for want of care. Bell 14. 5 May 2^o 709. 1 Rock 6. 65. 3 June.
2827. 1 May 48. 1 Pow 6. 25 21. 5 June 25 5. Hol. 17. Salt 65. 6143.
1 Noll 2. 11 22 24 3. 5 May 26 4.

A special action on the case, lies on the case of
the finder, supra. Csp 590. Salt 65 5. 62. May 24 17. Pow 6. 25 2
Jansor 6. 4 2. See 50 Myspl. Common carrier. Salt 65 5. 62. 581.

If a carrier of goods loose them, Strover lies not.
Salt 65 6. 14 3 & antl. supra. If he is at more, not expenses
therefore no conversion - he is not liable on Strover -
But the Bailee of "goods, may have his remedy by a
special action on the case according to the custom of
the National.

If unlawful user consists in selling the property,
Indebitatus a畔us is concurrent. Bell 13. 6 of 219.
2 6. 144. 1-2 257. 6 6 69, to receive the money sets for
money he receives from the action of Indeb. Upon first
the vendor is concerned a trustee for the owner, of the price
of the goods sold - which price is recovered by the soldier
in the action of Strover the value of the goods sold is the
rule of damages, consequently the owner of the goods
may by claiming his action, recover at his choice the
price of the goods sold, & their value not regard-
ing the price.

But unlawful detainer is a conversion. As it
the soff. wrongfully refuses to deliver on demand. If indeed
there has been an actual conversion, as by using, de-
stroying, taking the goods, refusal are not necessary
to right of action. though the possession was lawful.
Csp 589. 590. 1 May 26 4.

Private Wrongs.

Proo. 3

But a refusal to deliver on demand is not itself a conversion, or unlawful delainer, for it may be justifiable, as e.g. not sufficient evidence of ownership concerning the demand. Esp. 520. 2 Buls. 312. Compl. 529. So the Ld. may have had a lien on the property, as an Banker or carrier &c. 2 Show. 161. 2 L. Ray. 752. Cop. 582. 2 Bur. 936. 4 Bur. 2221. So it may have been destroyed without his fault, or lost or stolen idem supra. Walk. 653. Esp. 520. 2 Bur. 2827. L. Ray. 752.

A Demand & Refusal therefore are only evidence of a conversion or unlawful delainer. Esp. 520. 1 Rock. 131. 5. C. 50. 3132. 153. 7606. 187. 2 Show. 179. And only prima facie evidence. 10 Co. 56. 57. Cop. 590. 3 Bur. 1243. 2 H. Bl. 135. 136. This is denied in 8. C. 112. Moore 460. said to be a conversion. But see Compl. 529. [The proposition is however unquestionably true.]

Hence if the Jury find only den and refusal, the Co. cannot decide for H. J. Esp. 520. 10 Co. 56. Pro. 8. 97. 415. Heard 47. 3 Bur. 1243. [For lack of conversion is still to be found.]

It is a rule of C. Law that a finder of goods has no lien on them for his expenses & trouble: He cannot justify a detainer. 2 H. Bl. 254. 2 Bl. R. 117.

If one having goods of another, puts them into the hands of a 3^d person wth. the command of the owner this is conversion. Esp. 581. 4 St. R. 260. A servant is liable for a conversion by himself, tho' to the uses of his master & over by the masters order. Esp. 580. 6. 1 Will. 328. 8. 161. 813. 1 Corn. 221. Vide. Bull. 4. 7 quod vide - 2 Chit. 242

A's timber being on B's Land, A. asked leave to take it; B. refused. B was holder not guilty of a conversion. There was no intermeddling nor mischfeasance. 5 Bac. 259. 29. 2 Buls. 310. 2 Mod. 240. 6 Bac. 178. 4. 2 H. Bl. 257. 8.

Private Wrongs.

However.

(Whom may maintain his wrongs?

If goods are sent by A to B. not to resell in B. but in order to answer a particular purpose for A. which cannot be answered, A may recover for them after demand. 5 T.R. 215. 493.

Suppose A finds the goods at B. B claims them; does A on natural delivery recover for value, &c. then sue & prove his property. Can B recover? If it has been decided in Eng. that B is owner, & A was obliged to pay, & value of the Goods the second time. There is no decision to be found in y^e English Books, but it is to be thought this decision in Eng. is incorrect - somebody must suffer, either A or B or both; it is not likely that a remedy can be had w^{ch}o. we take this for granted, & then the law ought to fall on B. on principles of justice y^e finding having acted with ordinary care, having done a neighbourly act & refused to deliver them to C. the payment not being voluntary, but by compulsion pro-
p^{er} of Law, he ought not to be compelled to pay y^e value of y^e goods
of sec^d time. And it is a rule that, when y^e law compels a person
to pay money over to another, he cannot be subjected to pay it again
to the person to whom it was paid his money to i.e. If A had
paid it voluntarily to C. without title, he w^{ll} be liable to B. But
that is not so here. See Delle. Buildings Lect. 3^d. 7. An analogous case
may be adduced, 3 T.R. 125. 213a & 11. 176. Bl. 669. 682 ang. 2. Ball. 54.
I will now turn on o^r - if administration is granted to a wrong person,
the person recollects y^e debts due to y^e estate, & after this y^e letters of admin-
istration are sealed, & admⁿ grants ann^t to y^e rightfull person, this right
for action cannot compel the debtors to pay a sec^d time, because
they have already paid their debts to a person having authority by Law to
do so & them. See 2 more analogies in Tit. Buildings. 8 para.

Pirate Wongs.

Wm. W. Moore.

It is not necessary for y^r plff. to have had the absolute ownership
of th^t thing. C.G. a Waite may maintain th^t action. 118 U.S.
3^o person. Not having y^r "General property" (See Tit. Baile.) 51 Bac. 2, 67
2 Koll. 569. 18 Id. 438. Patch. 214.

As a carrier having special property may perhaps in all cases maintain y^e action as a stranger. 113 U.S. 616, 64 F. 2d 223, 3 T. 140, 8 Com. & C. 218. 1 N.Y. 2d, C. 52. As a common carrier a special carrier. Register 105 Piac 185, 2621, Moore 545, S. Ad. 142, Esp. 577, called 31.

Do a Sheriff who has taken goods in execution, may main-
tain it. 1 Lex. 282. Rule 33. 2 Land 47. N.

So & Spec for years of a house blown down may have been
over for y^e timber w^t a Stranger who carries it away. It
has y^e special property. Ball 33. Cap 577.

No possession alone giving a right to maintain an action, unless it be the owner. E.g. when one finds goods. Ch 575. Com 219. Stra 277. 505. Bull 33. This gives him a kind of property, which will support his action against third persons. 2 Barn 473; 46. 208. 819. S.C. - 5 Co 24^b; 36 v. 332.

13. All types of possession must be acquired either legally or under
claim & colour of right - for if gained without colour of right
it gives no special property. P.C. Section 14. 3 W.L. 338. 2. Part 47 c. 11.

So a right of possession is sufficient. As where deft. having goods of T.S. was obliged to deliver them to plff. T.S.'s creditor - action lay. C.R. 576. 1 Bals 68. 1 Com 219. 1 Bals 242. 1 N.C. 606. 7 S. W. 2. 1 A.B. 482? The plff. never had possⁿ to 2 Sand 47 "now.

But a property of some kind is necessary. For where
peſſ. had sent an order for goods, to be delivered to his servant, &
the tradesman delivers them to y^e Servant, host - action.

Private Writings. 3

Nov. 3

Lay more money back, in favor of the purchaser, for no property vested in him for want of delivery. Salk 13. 3. 7. 186. Esp 576.
Bull 35. 6. - Secur if they had been delivered to ye Servant
of the plff. Watt 36.

An owner in his own Bankrupt may maintain this ac-
tion w^t a stranger. Bos 8 P. 44. Peake 140. 5 Esp 10. 142. Camp 589.

Formerly at Com. Law of an Esp^t or Adm^r. ? not main-
tained by action, for conversion on the Testator's intestates
life time. Now he may by ye Equity of ye Stat. 4 Ed³ 2 Bac 439.
de assteech. &c. I suppose. Esp 578. Wom 219. Co E. 377. Esp 582
Wom 60. 2 M^t 158.

Held on that an amount of conversion in intestates
life time, is supported by proof of taking in his life time &
using afterwards. 1 Com 221. Esp 589. Wom 60. - To ye time of
using lay in ye knowledge of ye Date - what. then? - was
not the taking tortious. vide Esp 572. 19 and 280. It is to be
considered ye conversion complete in intestates lifetime.

The Bailor right is ² to be founded on his own liability to
ye Bailee, i.e. if so at all, & conceive on ye probability of his be-
ing liable. - This always exists. 1 Bac 242. 10 Co 69. T. N. 18. 89. 92
5 Bac 164. 6. 2. 62. Co Lit 59. 15 Co 433. - of special property.)

10 on this in the case of depositary. 5 Bac 165. pl. 22. And
ye special prop^y sufficient which he has? Fones 13. 112. Case of
fidei depositus, "prop^y in only" held ex sufficient. Bailees he
may be liable. No bailee liable in all events. Policy re-
quires it sometimes. See 1 Balmer.

If one delivers to A. y^e goods d. J. S. the Bailee by deliv-
ering them back to ye Bailee exonerates himself from
J. S.'s claim - as such delivery is sufficient to bar an action.

Private Wrongs.

Grove.

by J. S. even if ye delivery back suspending the action. 1 Bac. 237. 242. 1 Ror. 606. 7. T. & M. B. 137. ex Baile. - Suppose ye Baile knowing the prop. to be J. S. has refused to deliver to him, is not this evidence of an unlawful taker? -

Necessity by bailee susp. the Bailee of his action for the full value, & vice versa. 13 Co. 69. 5. Bac 165. 163. 11. Ror. 559. See Wards only.

So Bailee by acting the wrong doer first, ousts ye Bailees of his actions. 2 Inst. 6. Commencing ye action will give a right of recovery. So if Bailees sue first, Bailee is ousted of his action of recovery for ye full value, but he may have an action for his special damages. See "Bailement."

There are no direct decisions to this point but it is supported by analogies. as e.g. in an affray of robbery by master or servant. 3 Bac 559. Dall. 127. 10a. Baile. So also if a Creditor has commenced an action vs a Thff. for an Escape, &c, & when he returns the action is not to be barred but ye Creditor may proceed to judgment. as y^e Thff. 46. 44. 52. 62 Stra 873. Gud 657. -

Bailee by suing ye wrongdoer discharges ye Bailees. He elects his remedy. I concur says Mr. Gould, see Dall. pag. who there are no authorities that this is correct, I judge "Kewe is of ye same opinion. It is a correct proposition if the other rule is true, viz. that Bailee by first commencing his action vs ye wrongdoer ousts ye Bailees of his action; and this I take to be sound. And there is an analogy between this case & a case where an action is brought to re recover: If an action is brought to recover, for example says "ye party waives his remedy vs y^e Thff." Is this reason is ye same in this case?"

On the other hand if ye Bailee sues first in such a

Private Wrongs.

Part II.

mens. & liable to y^e bailees & for says Mr. G. in St. Balaam's
"he that takes away a bailee remedy at y^e wrong door". This
rule is sound if the case goes so. If that is incorrect, sad
is this - this being merely a corollary of that. -

In 13 & 6 Ed. 6 it is said that he who has the ^{original} property
must have trespass on that action. (more) & him who has
y^e general property a Bailees. T. 16. 12. And that y^e possessor
in y^e title may go in mitigation of damages, but for
civis. says Mr. Gould (in Walcott) that whin in anything goes
in mitigation of damages, when y^e right of action accrued
there must have been a right of action to recover for y^e
whole, but him he has not a right of action to recover
y^e whole. Judge Reeve in his Pictures lays down a different
rule, that the Bailee may have a special action on
the case to recover special damages. 5 Blac 185. 266. Bailees
but who may he have trespass on Bailee to y^e bailees.
The action is prae for the loss of property due for y^e use of
it of the special interest. The value of the prop^{rty} is not
even prima facie y^e rule of damages.

Returning y^e goods after conversion, to C. L. does not
ouse his right of recovery. it mitigates the damages only.
Esp. 381. 5 Blac 266. 6 Chit. 212. C. 148. 16 Com. 221. 1 W. C. 5. £40. 2 B. L.
902. 6 st. 10. 696. But where y^e conversion consists in a tortious
taking, if wife delivers it, on demand, no damages can be recover'd
for the taking, that is waived in this action. 1 Bur. 81.

Recovery in Trover, wch^s the property converted, is
2d. except where it has been returned before verdict. 18 P^r
73. 11 Com. 142. 5 Blac 1078. 5 Blac 257. If former money of a stranger
is a good cause to y^e action. Esp. 593. 8 Com. 73. Then can't sue one recovery. 6 Bl. 3. 3. 1. 1078.

Private Wrongs)

Vol. 3

In a recovery on a solicitor's account for the profit he
only been sold is a man. 5 Inst. 280. 3. King. 1217.

So in trespass when converted. Esp. 593. If y^e pl^t,
has had a recovery on any concurrent action it is bar
to this. If y^e w^t pleads the form or recovery, he must show
specially if it were by the action of trespass, that it was
for the identical wrong laid in the present action, & a con
version - or if it were by the action of Tres. afft. that
the recovery grew out of the same conversion which is the
act of the present action; but it seems that the former
recovery may on Eq^t. be exhibited as evidence under a
General Issue. L. Ray. 1217. Esp. 593. f.

Against whom Recovery will lie.

It will lie at a wrongful taking, as also where
unlawfully used or detained his Baileys goods for against a
finder of goods who does not restore them to the owner on
demand, & satisfactory evidence of ownership for reparation
want of the owner who delivers his goods over to a 3^d. person.

And it is a general rule: that y^e owner of prop^y. may in
Eng^t maintain Recoveries not only of y^e first, but any subsequent
holder, even a bona fide purchaser (See 1187.) e.g. Bailee or
finders of goods. 120 Inst. 8 Esp. 579. Dall. 283. 18 Econ. 158. 11 Inst.
237. 5 Inst. 280. 266. Provided the Title was not in clear his own.
But yet it is to lie of the sale in Market overt was by covin.
250 Inst. 430. Esp. 579. 18 Econ. 158.

There is an exception to th. Eng. rule above, so far as
relates to others than first takers; in case of money, Wills
of Exchange. Writs for them can only be had by the

Vicelle Wiong.

1000 ft.

first taken, by reason of their currency, when they have been paid over to a thief, however on a bona fide consideration.

Reason of action. 175a. 452. 407¹. 1st Salk 126. 18 May 738.

Case in Mass. of a bank-note stolen & paid away for valuable consideration. Esp. 39. 500. 31 Dec 1516. 186. N. 485. Nov 9 611.

For a Stolen Article.

It lies for personal chattels in general. This action lies for choses in action of any kind, who only evidences of property.

& the date need not be alleged. Cor. C. 190. n. 162. n. 262. Esp. 593. 588.

Reason n. 19. Cro. I. 637. 1 Recd 5. 820. 1 Recd 115. Cor. C. 117. Salk 130. 283. 654.

2. & R. 708. for accurate description of it is not required because y. when a action is supposed to be on Detl. of property, but if he attempt to be & sue in the date of it & if sum. & unless he is so, he will fail in his action. (see Cro. 723 that is best.)

This action also lies for title deeds. Esp. 543. q. Recd 2. n. 12. 708.

It lies not in general for an animal ~~per natura~~.

1. 2nd. if confined & valuable, 4706235. ther' for such animals as are al. it does. e.g. of Hank. Com. 219. 1 Recd 5. 4 186. 235. 3 186. 263. d. 4. 18. 86. Hob. 283 Cro. 8. 126.

It lies for tame animals, as Dogs. Hob. 283. so in some tho' not retained being much & large & valuable. e.g. Horses, Dogs, Parrots &c. Cro. I. 262. 5 186. 264. 1 Com. 219.

It lies not for a Negro Slave or Eng' or Com. 5 186. 263. n. 146. Cor. C. 39. 1. May 1274. 38. n. 336. 2. Jun. 201. Com. see 3 Hob. 785.

It lies not for a copy or a record, because it is not private property or public property. It does lie for a copy of a Will, if it be being considered private prop. 15 186. 264. Recd. 111. 18. 540.

It has been held that it lies not for an copy.

Private Wrongs

Prover. 3

conflict on a Bag &c that it might be identified, as in the
rule. Cro E. 638. 661. 2 C.

In such cases it is helden, that as yr. Object is not to
recover a Specie, but damages only, it must be for money
not things Circumstances. 3 Bac 264. 1 Com 219. 1 Roll 5 L 15. 10.
Cro Com 896 in 1st Ed. & Cro E. 818. 841.

If a Person loses her Husband, money at play,
thrown by yr. Husband. 3 Bac 264. 6 Ed 122. 1 Roll 33.

When goods are pawned, yr. Pawner may maintain his
right after delivery of yr. money. 3 Bac 264. Cro J. 244 Ep 390. 1 Roll 72.
4 Co 83. 2 Ray 916. Bulk 522. 1 Com 220. 4 Com 258. see Taintor.

If pawns on an usurious contract, yr. Pawner cannot
maintain recover, till he has recovered yr. money advanced
& semi. yr. interest. 15 R. 153. The action being not to enforce
but to be relieved against the Contract. There is a. Equi-
table action. If Plff. must therefore come into C. with
Equity on his side; & for this reason it seems that no one
by the principle at last yr. interest shd. be recovered, as in just
his demand is due yr. Dft. - and it seems that unless he
has done so, he cannot support this action, tho' upon
contract of yr. payment & th pledge, strictly void.

A parol gift of goods without some act of delivery
does not transfer yr. property of Goods, & yr. action will lie
in such case of damage, by having taken possession.
Cip 577. 1 Bac 239. 2. 2 Com 30. 31. But without demand
would not yr. gift by parol be a license?

(But delivering the Key of the Room where the Goods
are kept, is sufficient.) 2 Bac 955. 1 East 192.

Sept 13 Rank this middle

Fraud. Wrongs

70001.

One Tenant in Common or joint Tenant of a Chattel, cannot maintain this action as his companion tenant may be taken of it as "not guilty". Com 458 18 May 1811. Esp 586. Salk 240. 5 Buc 280. 10 T.R. 658. Joint need not be joined in Abatement if the possession of one, is ~~not been abated~~ seen of it to destroy it. Esp 586. Co 200. 18 East 363, 368. 1 Bull 34. 39. If lost by one only as a stranger, plea in abatement. i.e. advantage must be taken of the non-juror supposed by plea in Abatement. L. & P. Salk 290. 2 Ror. 113. Cro 8549. Esp 411. Dice 323. Salk 4. Stra 820. Com 460.

The action being for conversion of personal property, only covering a thing from another's hands is not a conversion (5 Buc 257) as taking a door from its place carrying it away. Cro 4129. But if the owner is "possessor of his own goods," conversion is presumed after verdict. Cro 4129.

But lasciviously taking a thing already owned is a conversion. May 125. 5 Bac 257.

Throwing goods overboard to save a ship is no conversion. 5 Bac 258. 2 Buls 280.

The Declaration must state a place, or it will be in substance Esp 588. Cro 6. 78. 20 T.R. 30. If the omission of stating the place where it is carried to verdict, seems to

The Declaration or Prover ought to show property in plkt. but stating "possession" as of his own goods, is sufficient. Moore 691. Maid 111. Com 222. 5 Bac 271. Seawider 2 Sand 379. Stra 1023. Com and original not necessary to state.

The time of conversion must be arrived. It is not necessary for the owner to prove it was arrived. Esp 588. 10 Mat. 135. Cro 428. 1 Com 224. Cro 4. 97. When the time of conversion was laid

In law y^e common ch^t "if there ards conuict" was holden sufficient to be
Sufficient void. L^eu. as to y^e arrest of judg^t 313C.394. Cauth 389. Pro^d 428.
5 Bac 316. ¶ The omitting to state the time (scm^b) is cured by verdict
the ch^t ch^t contrary is holden in 17 Mart 135. Proof of a conversion on any
other day than that stated will sufficiently support y^e declaration,
it^tll be not run upon by y^e Stat. Limitations. ¶

The thing must be described with convenient certainty, former -
ly it must have been described with great accuracy. "Divers Books"
is sufficient. 1 Dowl. 114. 817. 12 Dowl. 301. Esp 587. 8 L^t Ray^t 588. 2 Lov. 176.
L^t Ray^t 99 or 999. Bull 37. Sba 829. ¶ Not y^e necessity of alldging
the value of y^e goods,.. 5 Bac 275. Pro^d 130. 147. 8. "price, value"
F. A. B. 85. The value need not be stated according to Esp 588. Pro-
yac 148. 2 ea. Esp 407. 3 Lov. 430. 5 Bac 275. ¶ Falsity laid down in Esp ¶

It is said that ch^t in only two y^e 000 p^s in divers general offices
suffic. Esp 592. 1 Kibb 300. 5 Bac 276. ¶ Because that any other facts than
a release or some other satisfactory ev^e of y^e operating as a discharge,
will amount to y^e Gen. issue, the specially pleaded & because any special
p^s facts must admit y^e fact of a conversion, & that being a fact of an
importing an act, per se wrongfull, can never be justified. Yet notwithstanding
the technical propriety of y^e rule, it is not adhered to in
practice, for if many p^s have been allowed. Yew. 198. 17 Mart 146. Pro.
I. 73. Sba 1078. 8 alk 654. 210 Sba 60.

But a justification may be given, as evidence under y^e
Genl. issue. Esp 503 or 543 or 593 Bull 48 ¶ Any thing but a release may
be given as evidence under y^e Genl. issue, & that is in Conn & Stat.
Limitations in Conn. does not run vs. Trown over when concur-
rent with trespass so decided by y^e Sup^t Ct. L^t. ¶ It is y^e decision
from reason principles.

Private Wrongs.

Action of Assault & Battery. By McDonald.

An assault is an attempt in effe^t to do a corporal hurt to another by force, without touching. e.g. lifting a weapon or fist in a threatening manner. 1Bac 154. 3BL 120.
Esp 312. Mod 15. So presenting of a gun, drawing & waving a sword, pointing a pitchfork &c at one within the reach of it. 2Rox 545. 1Bac 2153. 1Hawke 133. Any unlawful striking upon the person, &c by an effort to beat. (Ford A.S. 202.) This is an inchoate violence & amounts to an injury; 3BL 120. 3Ruris H.E.L. 85. tho' no actual damage.

But a gesture, otherwise amounting to an assault may be explained by words, so as to fall short of an assault. 1Bac 154. e.g. A lays his hand on his sword & says, "if it were not a peace time," &c. for the intention must operate with the act, to constitute an assault. 1Mod 3. Esp 312. 18. Nov 137. 2Feb. 545. Words alone then cannot amount to an assault. ancient opinions contra. 1Bac 154. 1Hawke 134. 133. 2Rox 545. 1Com 590. (But threats of bodily hurt, producing actual inconvenience is an injury). e.g. interrupting ones business. (3BL 120. 1Rurid Truspath. 1Post. 3.)

Battery consists in the actual commission of violence upon the person of another. Esp 312. The least degree of it done in an angry, spiritifull, insolent or rude manner is a battery. 1Bac 154. 6Mod 149. 172. 1Com 589. 1Hawke 134. e.g. spitting in the face, treading on the toe. "The unlawful beating of another." 3BL 120. Ques. Is a battery of course unlawful? for it may be justified. 3BL 120. Fal 407. q. W. 4. 5 apd Blackstone's definition is correct. q. at all reason. It may be justified. T. 3. 1.

Private wrongs.

Affault & battery.

Brown battery includes an assault. But the rule does not hold & converso of proof of battery will therefore support a charge of assault battery. Mac 154 176auct 134. Sat. 384.

Miscellany of bodily hurt, the most amounting to assault, i.e. woods actions cannot constitute an assault, are in some cases actionable injuries. When they occasion an inconveniencce, they are actionable, otherwise not. 3 Bl. 120. Brown 202. Brown 390. 1. 2 Roll 545. The action is trespass in et armis. 3 Bl. 120. 2 Roll 545. for the imbutate violence.

In battery, the injury must be immediate. But not necessary to battery that the injury sh. be of instantaneous effect of the act of the wrongdoer. Sufficient, if produced by a connected train of effects. In general any wanton act, by which one causes a battery, supports the action. 2d. 180. 295. e.g. wife threw a squirrel into the market place which eventually put one puff's eye. 3 Will. 403. 2 Bl. 16292. Brown 634.

The particular distinctions between trespass & asslt. post. Both trespass on ye case

So if one pushes another wantonly or carelessly so the latter falls against a tree, the action lies against y' first. 3d. 313. 1. 20. 16.

In a House taking sudden flight runs against a person the rider not liable not sued. But if another person struck the horse, he would be liable for all consequential injuries. 17. 3 Bl. 4. 16. 403. 1. 200. 24. Brown 389. But 337. 1. 200. 16 that he is liable in an action on the case. See. 1. 200. 16. 3d. 187. 1. 200. 16. and note 1. 200. 16. 1. 200. 16.

When a person receives bodily hurt, from an act, to

Private Wrongs of Assault & Battery.

which he consents, he may sometimes have an action even
others, it is said not. Esp 313. Rule: If the act consented to is
legit., he has no remedy. E.g. Hunt by playing at cards.
no action. It promotes courage. 1 Hanc 154. If Hunt by box-
ing, consented to, he has action, for boxing is unlawful.
41 Bull 16. 2 Rec 174. & consent C^o. not make it lawful. &
"volenti non fit injuria" does not apply. - Consent now.
Are we not both parties criminals?

So consenting to be beaten, does not justify the beat-
ing. Esp 313. Comb 218. Bull 17. Due in the civil action?

But that the injury happened in an amicable contest
or wrestling, is a good excuse. Consent good. L. w. 12. 125.

If one in defending himself accidentally hurt another
behind him, he is liable to this action. 2 P. L. R. 896. 1. R. of 2488.

Malicious intent is clearly not necessary to subject
to the action of trespass or assault. For a lunatic is liable
to it, civilitor, Latich 13. 110. Doug 640. Esp 399. 16d 154. the
not criminaliter? 1 Hanc 6. 81. It is a general rule that in
case arising of ex delicto, ignorance of intention ex curre.
L. o. f. 649. not universal 1 Com 204. 1 Com 219.

But how far accident will excuse an involuntary trespass,
has been a Ques. of some difficulty. According to Fonsk. it is
it is sufficient to make one liable if he has been "the physical
cause of damage" 1 Hanc 6. 81. This is too broad a rule. For it does
not admit of even inevitable accident as an excuse. If the
injury happens by the fault of the party, it is no excuse. 1 Hanc 155.

It is said that "inevitable accident, or inevitable misfortune
shall excuse. 1 Hanc 134. 1 Com 587. - 1d 35. 2. 1 Com 543. 3 W. 637. 2 P. L. R. 918.
3 W. 4. 10. 1 Com 596. 1 Hanc 6. 81.

Private Notes; Fault Walling.

Meaning of "inevitable" what? That the accident
should be physically unavoidable? [^{Ex. of} so the case in Wall.
16. seems not to be Law, where a distinction is taken be-
tween accidentally pushing a drunken man against an-
other, & attempting to upset him. For in the latter case the
accident is not physically unavoidable.] Ado in Hob. 104
the Cc. tho' they use the word "inevitable," argue on 7 ground
of neglect. Hob. 154. 5. Exp. 313. 383. Excused if "utterly without
his fault". Hob. 134.

Buller (N. P. 16) supposes that if a horse used to run
away with the rider, takes a freight, & in running injures
another, the rider will be liable on the ground of neglect.
And yet the immediate injury would seem as physically
inevitable, as if the horse were not addicted to running
away. But how the remedy would be easier from neglect,
not the rider but, 16 vol. 295. Most of the examples
given suppose some neglect, as the case put of cutting
a hedge of thorns, which ate or puffs down, than was
neglect. H. May. 467. So in the case of Copping bought
so. case of cocking the gun. Hob. 596. 4. Mur. 2092.
Exp. 383. So where timber floods on his land. 24 Hob.
267. 8. "Action on the case."

"Rule is clearly, that where the injury is inevitable
the officer is excused. Hob. 134. 2. 136. N. 896. 8. 3. With 377. c. q. one taken
with the application of falls against another. (The injury can't
be said to be inevitable, where the act causing it is voluntary;
i.e. when the act is not the effect of the cause above: equals
control.) But still there is no liability if the party injured
is himself the faulty cause. Post. Pagan.

Private Wrongs. 3. Assault & Battery.

In other cases, according to some opinions, if the act causing the damage is lawful & the agent guilty of no neglect or want of care - he is excused. Esp 399. Bull. 16. 16. Esp 317. 313. (E.g. helping a drunken man as put in Bull. ch. 9 16. 17.) v. Dac 168. Sid. 2d. The better opinion seems to be, the injury must be inevitable. with ante.

In the case in 4 Burn. 2092. (case of a deer killed by Dft's Dog) the Df. w. not be considered as the agent, nor the act his, unless the injury was voluntary on his part. [When the injury is wilful, the author of it is undoubtedly liable.]

But where the act causing the damage is unlawful, the author is in some way either in trespass or liable at all events, whether there is the least neglect or not, for the consequences, immediate or mediate. 4 Bl. 16. 893. 8 May. 15, 14. 480 12 - 660, 639. Vint. 295.

The above rules, as to accident to apply to trespasses in general.

The Defences to this Action.

I do the action of trespass in arms for Assault & Battery done in three kinds of defences - Denial, or Infirmitation which is a denial of the fact, excuse which admits the fact, but pleads it was owing to inevitable accident. This may all be given in evidence under the general species, pano Justificatione, which is the insisting upon something which made it lawful for the Df. to commit the battery. Pardon of this kind is usually bonassault domino of Bull. 17.

Assault & Battery are justifiable in many cases. 16. 16. 589. 3 Bl. 120. E.g.

Private Wrongs.

Opposite Valley.

e.g.: An officer having legal process, or not, one may use violence in case of opposition, so far as is necessary to effect the arrest. Esp 314. 1 Mac 155. 1 Hawk P. C. 130.

But a battery is not justifiable in this case unless there is a violent resistance. 2 Kng 229. On an attempt to arrest a fug. 2 d'In 1049. Bull 18. 19. 7. 1. 314. 3 Law 403. Brod. 43. Obstruction will justify an assault only.

But a mollitia manus imposita in making the arrest, is justified, tho non-resistance &c. 2 Stra 1049. 2 Holl 546. 1 Mac 156. Bull 19. 5 Com 355.

The law of "mollitia manus" refers to the justification of the battery as well as of the assault. 5 Com 355. Stein 387. Coro C. 93. 4. 2 vint 193. Con. 3 Law 404. Esp 314 but not of bruising & wounding &c. 8 H. R. 299.

Battery is justifiable on the ground of self defence. 3 Bl. 120. As if one strikes me first, I may strike him. So an assault by plff. is sufficient to justify a battery by Dft. As if plff. lifts a weapon &c. 1 Com 589. Bul. 17. 18. Esp 315. Plea, "on assault" &c.

But there must be some proportion between y^r assault & battery by plff. & that by dft. For every assault & however small, will not justify any battery however great. Holl 543. Bul 18. and the proportion is a question of evidence. A small blow will not justify a many hard - Dft strikes Dft. - a scuffle immediately ensues - If plff. is, may he not - do it. is justifiable. Gal. 642. Sid 246. Esp 315. Secis. if plff. gives a slight blow & Dft. in return strikes so as to may him.

The plea in this case is "on assault domine", i.e.

Private Wrongs.

A assault & battery.

that first assault proceede from pess. & that Dife. Blame is in self defense. Pleader off. 447. Esp. 315. Sal 642. (but may hem it seems is not justified by pess. aggression, unless plffs act might endanger Diffl. life.) Ray. 177. Esp. 315. Sal 642. 11 Mod 43/06, number? 160m 390?

Note the application de injuria s: see 1 Bos Bull 76. 8 Co 66.

If plff. was the blamable cause of the battery (that he did no strike or threaten to strike) Dife is justified in some cases. As when plff. kicked the seat on which Dife sat sitting, & Dife bit off plffs finger. 1.8. Ray. 177. Sal 642. Note the margin: in this case seems to have been justified by plffs attempting to gouge Dife. according to 11. Mod 63. L Ray. 177.

So when plff. threw his man into Diffls heap, & a scuffle ensued. Dife justified. Esp. 315. Cro. & 366.

Parent justifiable in giving children reasonable correction - master his servant - Schoolmaster his scholar - can - quoter his prisoner. Esp. 315. 18 Ed 176. p. 176. 2nd 120 Bull 18. [Such are not liable for the battery (if reasonable) for the relationship constitutes justification.]

So according to some, a husband and his wife. 16auth. 130. Met. 1380. 1 Inst 155. These relations constitute special justifications.

A man may justify a battery in defense of his wife & concubine. So of parent & child. Esp 314. 18 Bull 18. 2 Ray. 621. Clearly a servant may justify in defense of his master. Wm & concubine. 2 Inst 568. Esp. 314. 18 Bull. 18. 19. 2 Ray. 621. 4 Inst 546. 1 Inst 484. Sal 407. 160. 429. 8 Co 66. 334. Stra. 953. - That the battery must have been in

Private Wrong - Assault & Battery,

defence of the wife, &c. to prevent her from being injured or vindictive. Esp. 318. L. Ray. 62. n.

So one may justify battery in defence of his property, forcibly intruding, as by breaking a door-gate, &c. But if there is nothing more than a mere entry on a man's close, which implies force in law only, the owner is not justified in a battery without a request to depart. Esp. 314. Bull. 19. Sal. 641. 1 Hawk 130.

In case of entry on land however, the battery must, in pleading, be justified, not as a battery, but as a molestation manus improposit. Bull. 18. 19. Esp. 314. 315. L. Ray. 62. Sal. 407. 5 Com. 355. 1 Mod. 36. 3 At. R. 78. Contrar. -

The last rules contemplate the owner of property in possession, & relate to his right of defending his possession. But when he is dispossessed, a different rule now obtaining, tho' as to real prop'ty not known to the Co. L.

At. C. Saw one who had a right of possession in entry on land, was allowed to regain possession by force, from the disposer or dispossessor. 2 Wm. & 5 Eliz. 555. 3 Edw. 179. 4 H. 148.

But now by several English Statutes (the first of which is th. 5. Rich. 2.) one may not enter on lands &c. of which another is in possession, (as by holding over after a term expired, or taking a vacant possession) except in a peaceable manner. 2 Wm. & 5 Eliz. 555. 4 H. 148. 3 H. 179. Saw the same by Stat. in Cons. Stat. 6. 209.

These Statutes contemplate only possessions which are in some way, &c. Some degree abandoned by the owner. As in the case of a lease when the possession is given to the tiffner; & in case of lands &c. of which the

Private Wrongs.} Assault & Battery.

possession is neglected by owner & vacant. Merely taking a journey is not an abandonment, so as to exclude owner's right to use force. Post. Sic. Troubles. Engg. 1.

In case of personal property, owner not allowed, at $\frac{1}{2}$ d. to regain possession by force. (3 Bl. 4. 5. 3 Inst. 134. 2. Rule R. 55. 6. 2. Rule 55. 6.) unless feloniously taken. Provocation never justifies a battery, but may mitigate damages. (Witl. 6. Esp 317.)

A steward cannot justify a battery in defense of his master's goods. 5 Com. 354. Coro L. 2. 142.

Assault & Battery at different times cannot be laid with a continuando, nor diversis diebus et vicibus. (Esp 316.) You are assaulted by one entire individual act. (Conf 828.) See 3 Bl. 2. 12. Sal. 638. 9.

For battery of wife, husband & wife sh^t join, & the injury sh^t be laid, ad damnum ipsorum. If the Husband is damaged by spouse & Post. Sic. 1. of the wife, & the wife is personally injured, & the damages are survives to her. (Esp 316. 1. 1. 1. 387. 1. Note. 782. L. Ray. 1208.)

If damages are laid ad. d. annum of the husband only, judgment arrested. (Esp 316. L. Ray. 1208.)

If p^{ts} are not husband & wife it must be pleade in abatement. (Esp. 3. 21. Stra 480.)

If battery has been committed to husband & wife, he alone must sue for the injury to himself. (Esp 316. L. Ray. 1208. 1. Note. 782. pl. 2. See Coro A. 655.) That if both join in this case, for both batteries & several damages, will abate upon husband. (Esp 316.) after verdict. If joint damages, judgment will stand in toto.

Private Wounds;

Assault & Battery.

Def. may lay in aggravation of damages, it would many facts for which he could set himself in. e.g. a spanking servant. Esp 317. Sal 642. Qu. How to aggravate damages, or to show how unusual the trespass was? Abb. null.

Miscellany.

In Env. a justification must be pleaded in case of a battery or an assault done to you it cannot be given in mitigation of damages, if the assault is done in other case of trespass. Esp 317. Sec 36. n 82. i.e. where the party on the facts shows *in prima facie* a trespass.

Best circumstances which attended the transaction, not words spoken at the time, tending to create malice in the party, may be given in mitigation of damages, tho' pleaded they will have been a justification. Esp 317.

If party justifies an assault or he must confess battery, or the place is ill. Esp 318. Sal 637. C. G. Plea that party has run away with his wife. His wife - there is no battery by wife.

The general application to a plea of son assault to is de injuria t: Esp 317. Bac 153. 5 Com 354. [de injuria s: is a denial of party's plea son assault s-]

If party pleads son assault, 1^o pleader justifies the assault, he must reply specially for he can not give his justification on evidence under the general application de injuria t: Esp 317. Com 253.

Murder of persons may be either felony or homicide. Esp 317. Bac 17. Sal 137. 4 C. 6045. A most evil accident.

Private Property.

Assault & battery.

To the plea of "molliter manu": the plff may reply "he
done not do any damage", which I suppose constitutes a denial
of the justification. or "an outrageous battery" which he
is not liable, manu" 4: 5600m 35th Chancery 1486. Com Pl. 3. M. 16.

Ifff not confined, in proof to the time laid in the declaration,
may prove any battery, not burns by the heat consideration.
So special plea must cover all the time, must be as broad
as the declaration. vid. 3 Barb. 206. 7. 11 Barb. 108. 3 Stans 2, 15. 600 C.
2, 28. Hob. 104. 18. May 229. 231. Esp. 407. 321. 319. 410. 282. 512. 229.
Co. L. 2, 83. Co. 8. 32. Ball 17. 4 1800, 29.

Need not traverse as to prior to subsequent time, when
he pleads not assault domino? permb. not. (Bancr. 17. 13. Indus. 4:
447.) for proof of plff's assault on any day is sufficient.
(If it is driven to a stand, a pigmentation.)

The plea should be as broad as the declaration
as to the subject-matter, i.e., should cover the whole
injury. Esp. 318. E.g. If plff charges assault, battery, wound-
ing, a plea reckoning the battery & not the wounding
is ill. 600 8. 208. So an assault domino covers the whole of a
burning? Esp. 318, but the words are "that the just made an
assault & that before then & then defended himself, & any
damage or hurt it happened" & "standards esp. 447. See
if "molliter manu" etc. etc.; that does not answer the
allegation of wounding.

In justifications founded on the relations of husband &
wife, servant &c. the assault &c. must be proved to have been
made, to prevent injury to wife, husband master &c. not
by way of revenge. Esp. 318. 8. May 262. 4. 3. Rott. 546. 80. 903.
110. 8. 2. 39.

Mr. C. can't plead a loss: husband must join in all cases. esp. 818.
110. 8. 2. 39.

Private Songs.

Fraud Waller.

of former recovery of damages \$47.00 in another, is
a good plea in Way No 800. Esp. 209. 616. Stat. L. 600 & 73.4
Rule 24. p. 68, 5 Dec 1851, 160m 111.112. for the uncertain
damages are recoverable in some jurisdiction, which causes
any one's satisfaction, not recovery. etc. No
reason that in case of sole damages being uncertain
plaintiff might multiply actions from the hope of obtain-
ing more. In case of contract the sum being certain
he may make no inducement, if the original deft. is solvent.

The rule holds even if further damage occurs after first recovery. See 319 Salt L. for the better view.

Be in full pay, generally a former moving to a new post,
etc. all continuous subsidies commuted before the date of the
first unit, 2 Novt 32.0.

The only action, as in all trespasses, in the injury is done by several, the party may still call on any. Ex. 37. Sec. 2265.

Release to one, is to all. Esp 415. 7606.66. Whenever
a Home Court is made. Left. It so justify, the husband
must join on the plea, because every plea must be
signed by an attorney, who has not the power of appoint-
ing one. Lrs 2. 239. 7

Seeing Images.

to Soring. Damages, & full & complete recovery.
If less or more, as charged, jointly, and severally,
jointly, or each guilty of all, may recover damages
as above, & costs, & attorney's fees, &c. &c.

of judgment goes w^t both by Richard

Vicarale Strongis. 3 Affaule & Peculatry.

The vicarages cannot be sevred. Esp. 420. Stra. 422.

If vicar & sever in their plns. e.g. one pleading the vicarial issue another a justification the jury may serv tho' the several dfts. are supposed to be equally guilty, according to esp. 420. 2d Stra 1140. Iusas contra 1160 67. Bull 20. d. C. 620. 1. 34. 8. or 350. Court 19. do. C. 860. 760. 66. 400. 79. C. 210. 2. Cro. I. 384. - 118 contra 20. 321. Cro. 8. 118. Idee 2ee. In 18. 2d 207. a.m. that the garn. cannot be serv'd 5. 15. 2. 2792.

But in the cases, where the damages ought not to be serv'd, plff. may, prevent dft. from availing of judgment or taking vnor, by remitting one ap'stment, & taking judgment, for one only. There can be only one execution, in these cases. Bull 20. 6o art 19. 1160 7. 2. Execution may go only vs. the one, vs. whom its amount was affixed. Court 20. Bull 20. 1. 5. 1. 207. a.m. 67. 12. 199. 200. Cro. C. 239. 243. If plff. will enter a nolla prosequi as to the other, or without a nol. pros. he may take judgment for the greater dam. ag. 6. 6. th.

Plff. may arrest judg. in these cases, if he so elects, or he may enter a Nol. pros. as to one dft., & take judgment vs. the other, for the one ap'stment. Bull 20. Cro. C. 173. 176. Court 19. 760. 70.

It is said that Jungs, may, in trespass, find one guilty as to one party, & another as to another, & ap. for dam. severally, & the finding will be good. (Esp. 420. Cro. C. 860. 79. with out remittance.) This is supposed to be the general issue. Where they are not found jointly guilty... 1160. 57. a. Con. unless the different dfts. are found guilty, of different parts at different times. This specification adopted by our Sup. Ct. inidd & County.

Pecuniary Wrongs.

Finance Waller.

Cro. C. 84 and 100. 20. accord with 11. 605. 7. in Chiswick
decision. Therefore when the injury is one entire, but by
the party cannot know, because the wrong was in di-
visible. P. 2. 484.

This rule is adopted in this state, viz. that if two
or more jointly charged & found jointly guilty, i.e. each of
the whole, damages cannot be recovered. London & Westmor.
Ex. P. C. Crim. Act. 1798. Then 2d. off. plained & over all "not
guilty". If one is compelled to pay the whole, no contribu-
tion, in law or equity Kibb. 116. 8d. 1. 186.

In Eng. it has been holden that a male prosecuti-
or may sue in one of several Off'ts. before judge & while
others discharge the actions as to all - it operates ab initio
lease to the one. Hob. 70. 180. Russell v. S. Smith by Cro. I. 1783. 1784.

Practice otherwise in Law. Not now considered as
law in Eng. 2d. and 2. 97. n. 2. 8d. 16. 511. 1 Wilts. 90. 306. L. 1 May. 397.
Smith. 19.

And in Eng. when the Ct. will give plaintiff to strike
the name of one, out & improve him as a witness. Rule.
when 2d. other Off'ts wish for his evidence. Rule 2. 85.
2. 8d. 2. 97. 1 Wilts. 441. London. et. al. who suppose of
accident wth him, he may be a witness. If any at all accus. He
must then be tried before he can testify. The Ct. may
be a verdict as to him, be first taken.

All causes of action, arising ex delito, a. l. the
respective case to the wrong, are general. 5 U. R. 651.

The jury may, if they please, examine & relate distinctly
a part. Rule comm. to action of trespass on person. Est. 421. n. 100. 884. 6. 10.
"q. 34. 8. 1." Rule of Ct. to try all acts of the wrongdoing.

Private, Wrong,

Small Injury.

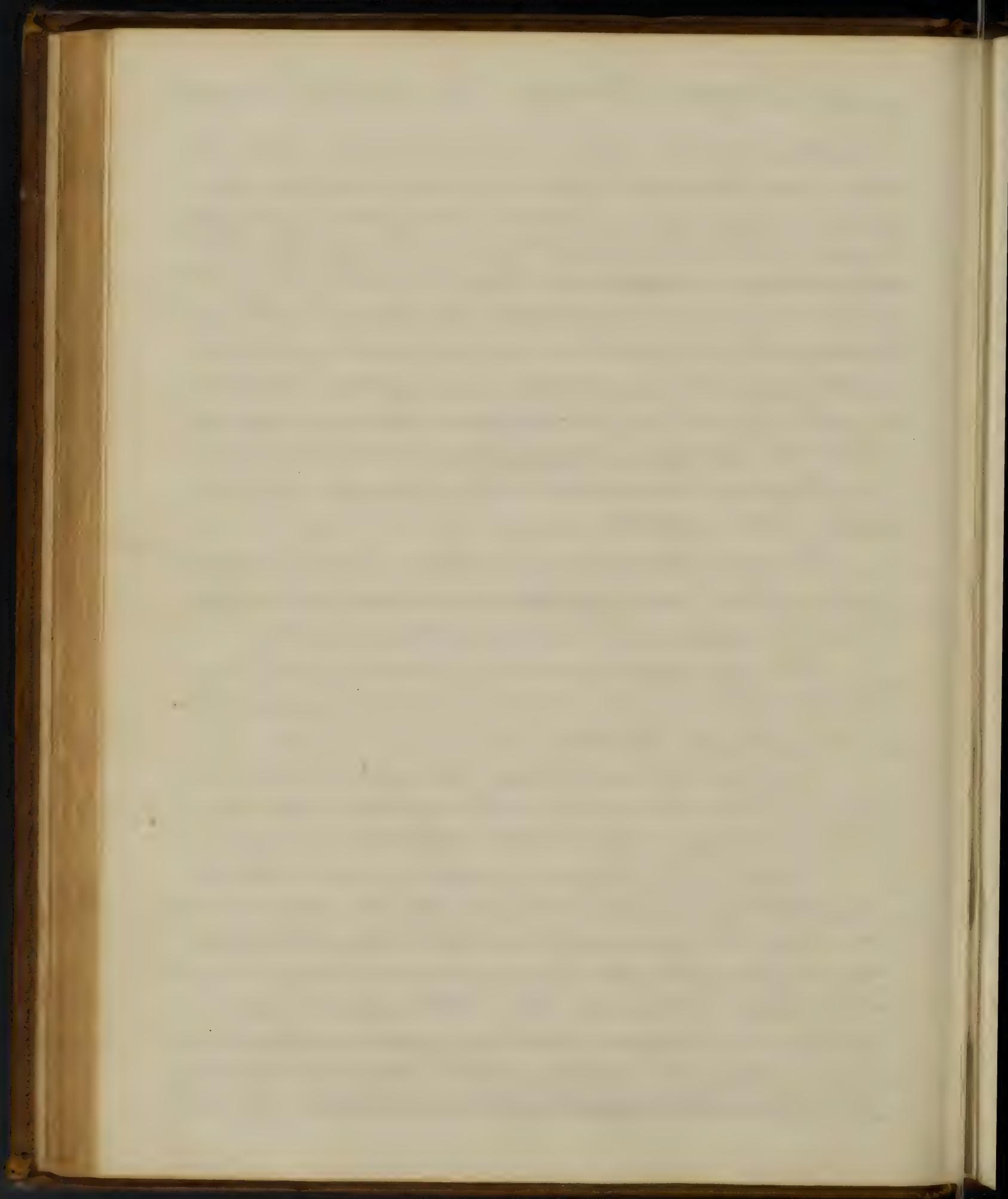
Finding more than is in issue is idle. If there has been a "may have", the damages on view, increasing damages at their discretion; & if the "no may have" is expressly laid in the Declaration, they may increase it if the judge certifies or reports it. But it must be done in Bank. It cannot be done by a judge of His jurisdiction - plff. must be present when motion to increase is made. Founded on the rule, that in appeal of "or affirm", "may have" or not" is to be tried by inspection. Esp. 322. 12. Ray. 176. Hatch 223. 3 Bl. 332. 3. 1 Sid. 108. 1 Will. 5. It must be proved to be the same hurt, for which the damages were given by Jus. 1. Wall 21. Esp. 322.

So damages increased, ut supra, in Case of wounding. Esp. 322. 2. Ray. 176. 3d of atrocious battery. 3 Bl. 332. 3. Harmer of wounding must be laid in the declaration.

Damages not increased in these cases, if the judge who tried the cause, declares himself satisfied with the verdict. Esp. 322. 1 Will. 5.

The Jury cannot give more damages than are laid. Esp. 420. Crost 297. But if they do plff. may have judgment on remitting the verdict. Barth 21. 10 Co 115. 1 Bl. Bl. 643. 4 Bac 25. 6.

Every assault & battery is a public, as well as private wrong (1 Bac 156. 1 Hawk 184. 3 M. 121. 4 Bl. 145) punishable by fine & imprisonment. 4 Bl. 216. Stat. Con 336. 7. Title "Public wrongs". Secret assault a distinct offence under our stat. Stat 338. So the remedy is distinct from that in other assaults. Several may be joined, when the secret assault is by several. 1 H. 6. 158. The person who is secretly beaten may (by Cor. Stat.) by applying to a Justice, & peace or other magistrate, & making oath of the battery, &c. have a commitment, have a forthcoming process, & the justice to will bind him over to the next Ct. of



Pirate Wrong.

Action of Trespass vi et armis for False Imprisonment.

Every unlawful restraint of liberty, or rather every violation of one's right of locomotion, is false imprisonment. 3 186127. Esp. 376. 8. q. Illegit confinement in a private house. 3 186127. Ins. 589. 3 Bac 169. Blackb. 8. 202.

It follows therefore from the definition of false imprisonment, that there are requisites essential to the constitution of this wrong, viz., if it is detention of the person. H.H. Maliciousness of the detainers. 3 Bac 127. 2. Ins. 589. 3 Bac 169. Blackb. 8. 202.

The unlawfulness consists in want of authority. Authority may arise from legal process (Esp. 333. 202. 406), or from special cause, amounting, from the necessity of the case to a justification (3 186127) as the arresting of a felon by a private person (Esp. 334) just. He lies not for the crew of a ship captured as prize, tho' he prove to be no prize. Law of Nations. Doug 572.

But every arrest of a person for a civil cause, without legal process, is unlawful restraint. (3 Bac 169. 2. Ins. 51. 2.) A custom to imprison, without legal process, is not good. 3 Bac 169. 2. Ins. 145.

A private person not guilty of false imprisonment by confining a person arrested by a proper officer at the officers request. 3 Bac 169. pl. 24. 2. 1801. 361. He said that an

Private Writings.

False Imprisonment.

Please having made arrest in final process, cannot delineate his right of custody, in his own absence. 1805 4 P.M. 24.

In most common cases, are those of writing under
void, forceps. ¶ But the rules in the Books, relative to this
particular are not precise, but in some cases are contradictory.

Of the liability of Courts.

If a court of Record is guilty of corrupt practices
in imprisoning those on article, the judge is not liable
to an action, if he acts judicially, within his jurisdiction.
C. p. 326. v. d. 396. Com. p. 172; ("Maliz. Prose") C. p. 635.
1 S. R. 503. 513. 514. 534. 535. 537. 2 H. L. N. 1141.

In Eng. a judge of a Ct. of Record of general jurisdiction, it seems, is not liable for any judicial act, whether it happens that mistake or malice, if he confines himself to his proper jurisdiction. Eg. 3 & 4. 12 Edw 2 d. 4. Sat. by B. & R. May 14. 187. Court 172. 1st N. 303. 534. 535. 537. 538. 513. 514. 2 Blk N. 1141. where all the cases are cited. also proof in this case admitted against this "obnoxious & violent presumption," in favor of the judges integrity.

But it seems of a Ct. of Record of our general juris-
diction, has not jurisdiction as to the subject-matter;
Judges are liable, for how they do not act judicially.
1860, 76 & 1 Hawk 86-59. But if they have jurisdiction of
the subject, & in their proceedings transgress their juris-
diction, they are not liable. Bom. Rec. 1860, 76 & 1 B.C.W.
1143. 1st 396. C. of? awarding a Capias against person
in a civil case. Ct. of limited jurisdiction, the State or Court law
enacted of they transgress their jurisdiction by mistake. 1st 396 & 1143.
21 H.C. 12 1143. L.Roy. 454. 1st 396. H.C. 993. 1st 396. 2 L.C. 1143.

Private Wrongs. False Imprisonment.

Actions of they do not exceed their jurisdiction. 2 Bl. N. 1145.
Not liable for malicious acts, if they do not exceed their jurisdiction, they being of record. Esp. 326. Ital. 346.

Cts. not of record (as jns. pac. or Eng.) are liable at C. Law for any mistakes of judge. Ita. 710. Ital. 286 or 397.
1832. C. 354. 1st. 16. 536. Esp. 339. Ital. 395.

[See also for they transgress their jurisdiction in some respect. 2 Bl. N. 1145]. But this rigor is mitigated by several Statutes. Esp. 338.

That the Ct. of D. C. will not grant an information vs. a justice, who appears to have acted uprightly. 18. 16. 653.
In Com. Justices of peace, are Cts. of record.

Courts which can fine & imprison, said to be Cts. of record.
L. May? 467. Ital. 200. Court. 491. 3 Bl. 25. 12. Mod. 386. - Required
to be universally true. 2 Bl. N. 1146.

Commissions on the Estate of an insolvent debtor, not a Ct. of record in Com. No appeal from their decisions as a court.

Of persons Exempt from arrest.

Arresting Executor or Administrator for the debts of Testator, &c. unlawful - except on a suggestion of dishonesty. Esp. 326. 3 Wils. 368. 2 Bl. N. 1192. False imprisonment lies, in this case on the master, as well as on original debtor. It. - And the rule is general, that an agent, who is instrumental in causing an illegal arrest, is liable with the principal. 3 Wils. 345. 377. 2 Bl. N. 1192.

In this case I apprehend the officer would not be liable, the subject, or attorney being responsible for the person being

Private Slaves. False imprisonment.

immobile to the court from the cause of action having arisen within its local limits, p. 106, 26th 286th 385th Eng. 391.
1 Law. 95. 2 Law. 710; provided the loss of general jurisdiction.

Exemptions from arrest are sometimes in Eng. connected with the character of the individual, as *Ex. cit. supra*. Some times it arises from temporary circumstances, or particular privilige. As [?] the privilege of a tenant, extends to his effects, money & necessaries, 4 Com. 475. 4 Bac. 222. 2 Rob. 273.
17 H. 8. 636. attendance on him as a tenant or witness, &c. In the latter cases the arrest is not illegal in the first instance - but a sub judice suspensio bens, 4 Bac. 222. 8 H. R. 534. 2 H. 2.
1142. 1113. 4 H. R. 377. after, 5 Bac. 176. 6379. Doug. 649. 652
which detention is illegal & action lies. But against the debtors &
debtors pl. for only? Doug. 652. Com. 379. 5 Bac. 171. 4 Bac. 684. 5.
F. N. B. 436. 666. 52. 6 - against party to action & condictio. 5 Bac.
171. Com. 379. 4 Bac. 684. 5. 3 Buls. 97. [What is said by Willard.
(Doug. 652.) must relate to an action after the judgment,
as for the prior detention in case of a debt.]

In some a writ of protection, commonly obtained in these cases. This is as sufficient as an Eng. arresting one justified is therefore false imprisonment.

The rule in these cases is good. Suit continues.
1 Rob. 220. 4 106. 10. 1193.

Debtors & debtors certified bankrupt officers
not liable. He is found to obey the rule. Party may lie
in case? Doug. 649. 638. 106. 285th Dec. It's a suo iure dictum?
2 H. R. 231. 837. 830. Malicious Prosecution?

Privilege of tenant disallowed in case of collusion.
So in mariages actions, 2 Rob. 1193. 632. 830. Com. p. 176. 10. 1183. 11. 1107. 9.

Private Wrongs.

False Imprisonment.

it being discretion ary with y^e C^o. to allow or not.

So where a party attends at a voluntary upon pretence
or with a view of answering process, when there is none. Sal 544.

Party attending arbitration under rule of C^o. comes within
the exemption. 3 East 89.

For others detaining prisoner for fees, tho otherwise entitled
to discharge, not false imprisonment art. 5 Bac 171. 28 Inst.
53) Same law in Com. Sessus to boarder, Esp. 299. Root 158.

If the order of C^o. is to confine one in a certain prison, con-
fining in any other is false imprisonment. 5 Bac 171.
Sal 408. 5 Eliz 295. 3 Tal 219.

A peace officer is justified in arresting without war-
rant, on a reasonable charge of felony, tho no felony is
committed. Doug. 334. 345. 4 Bac 517 pl. 73. 1 Rol. 43. - Sessus of a
private person. But...

If a felony has been actually committed, a private
person suspecting another to be guilty, on reasonable ground
without malice, is not liable for arresting without
warrant, to carry before a magistrate. Esp 334. 5. 5 Bac 171.
Doug 345. Root 66. As to private breach of peace or escape.
11 July 150. 2 Hawk 82. Sessus if no felony has been com-
mitted. Esp 334. Doug. 345.

The original arrest on Sunday in Civil cases being
void by Stat. 24 Car. 2. & Stat. of Com 370) is false imprison-
ment. Esp. 327. 605. 5 Eliz 295. July 78. 2 Dan. 111. 4 Bac 456. 17 R. 265.
2136. 12. 1195. - Such an arrest good at C. L. 2136. R. 1195. 2 Buls. 72.

But Bail may take their principal on Sunday, (460)
does contra acta Bail to y^e off. 2136. R. 1273, for he is in nature
of a just or principal as a prisoner. & the taking by Bail

Private Wrongs.

False Imprisonment.

as relating on an issue, i.e. such an arrest, under an escape warrant, is lawful. *Hab. 626. 3 Hil. 143. Esp. 603.* - *2 U. 213. 1273.* Arrest in civil cases by breaking outer doors of the house, is false imprisonment. *5 Looq. 3^a. Conf. 1. Hob. 62. 2 Bac. 367. Secus of inner doors. 2 Hil. 64. 489. See "Sheriffs."*

It has been questioned whether, if an arrest is made by illegally breaking the house, the execution of the process is void, & the only remedy by action, or whether the execution itself is void, & may be set aside in any manner, by discharging the person arrested. *Conf. 1. q. Esp. 604. 6. not decided.* Said the Courts, interference is discretionary. - This was a case of breaking doors. *Bro. 908. Kirby. 383.*

Since decided that the execution of the process was void, in case of property taken by breaking a door to execute *pet. uside. 2 Bac. 367. 2 Soc. 285. 6. Con. & 80 5 Co. 93.*

In the last case false imprisonment lies, i.e. case of breaking doors. Different from case of seizure. In the latter on account of the privilege of the party, for the former is the offense ab initio illegal. *Hob. 62. Conf. 1. q.*

Also questions whether if an illegal arrest is made, in consequence of which another arrest is made, which would otherwise be good. The latter is void. It is void, unless some collusion. *2 Bl. N. 823.* - *Whether if there is collusion, same. 46.*

Decided an officer by escape warrant may relate his prisoner to another State. *11 Mo. 1071.* The warrant is of no use. Able to sue for another State, *5 Esp. 172. n.*

If an officer by mistake arrests the instead of him, he

Private Servants. Succession in prisonments.

is liable for false imprisonment. So even if he declare himself to be a J. Doug 42, & Rol. 552, pt. 5. Ch. 325. 2³ Com. 490. 490.
2 Rol. 552. Moor 457. 7 Edward 3. Due damages mitigate. Esp. 328.

In case arresting Right body or means or final process in civil cases when sufficient, personal property is recovered, is false imprisonment. 1 Moot 120. 2 Gw. 191. 5 Bac 176.
for the process is against both.

Any person has a right to arrest another who is fighting. 5 Bac 171. 156. and 136. 2 Ab. 81.) & to restrain him till his passion is over.

In certain cases, Femes covert, the liable to be sued with their husbands, cannot be holders under arrest or means process. 2 Gw. 1272. 17. 10. 486. 1136. R. 720. But there is no instance of false imprisonment brought in these cases. Doug 648. argues, can it be so? See 118. 2. 76. 136. 17.

In the last case (of feme covert) no action I conceive will lie - the process is legal, tho' the service is sometimes badly done, & the fine discharged. 2 156. R. 1193. 4. analogy - Doug 648. argued - original arrest not illegal.

Arresting & confining one, for a short time under a parol warrant from a justice, for examination, is not illegal. 5 Bac 172. Rol. 166. Moor 408. See Cro. 8. 829.

A private person may, without warrant, confine a person disordered in mind, & who appears disposed to do mischief. 5 Bac 172.

Vicarage Strong. } Halse Imprisonment. 3
Of the liability of Officers.

If an officer makes an arrest on a process, from the face of which it appears, that the C. issuing has no jurisdiction, he is liable according to the amount of authority. Est. 391. Bul. 82. 3. Hanc 4. 80; from whether in cause the defect of jurisdiction arises. L. R. 2. 200 cor. See Comp. 20. But this rule has been extended further.

This it. has been held (without any regard to the defect appearing on the face of the process not) that when a C. of limited jurisdiction, has no jurisdiction of the cause from whatever quarter the defect of jurisdiction arose, the officer would be liable. 1060 70. 77. Com. A. 314. Est. 397. Decision & reasoning in Marshall case. Contradict'd in 3d May 2. 230. Hanc 710. 993. 509. Look supported in 20 with 380. S. C. Est. 398. 9.

Decision in the Marshall case seems to be well taken in L. R. 2. 203. that when y^e C. issuing the process has no jurisdiction of the subject matter, every thing done under it is absolutely void, whether it appears or not on the face. Est. 391. Bul. 82. 3. Bent. 333. 4. Comp. 172. Hanc 4. 80. Hanc 710. 2d. 2. 2. 2. 65. 3. 4.

But where the Court, the of limited jurisdiction, has jurisdiction of the subject matter, & the defect of jurisdiction is from something local or personal, the Officer is justified w^t the defect, appears w^t the face of the process. Comp. 20. 513a - 170. 2. Bent. 196. 1 Bent. 3. 69. 113all 52. 3. Com. 2. 274. 2. 200. 29. 313a. 2. 233. Est. 391. Hanc 4. 80. Hanc 710. as according to L. R. 2. 230. 2. 31. Comp. 20. 6.

Private Wrongs. } Silse. Imprisonment.

is not liable even in this case, because the original Piffe
ought to have pleaded it. But 83. cap. 106, 76⁶ b 60 54². est.
case of Common Pleas. 3 Wilts 345. Est. 329 & 2 K. 703. 844. 2 K. 61.
384. 3 K. 6. 213. 6 60 54².

Officer may justly under command of the C. of
Westminster & Co. if tho' the writ be void, except when
the C. has not jurisdiction of the subject matter. 106 76⁶
6 60 54². 3 Wilts 345.

In how. an officer is justified in all cases unless the
process is void upon the face of it. Rule 110 182. 3 Wilts 387.
[When the jurisdiction is complete, & the process is maliciosly suspended, the officer is justified. nat. 10. 231. tho' the
C. or magistracy as the case may be is liable. Stev. 710.]

Where the Court having jurisdiction of the cause pro-
ceeds erroneously or improperly, still if the process appears
regular, the officer is justified. Stev. 10. 207. 231. 7 & 12 453.
3 B. & C. 333. 2 off. & C. 4 88. 9. 3 Wilts 345.

Rule seems to be wrong according to rule, article 6
of authority. That when the subject matter is out of the
jurisdiction, whether the jurisdiction is general, & limits
process is void & officer is liable. After when the want
of jurisdiction, is as to the person or place, then officer
not liable, unless it appears from the face of the process
more than in case of County of Westminster. But the latter
branch of the rule tho' true of some process, applies not
to final process issued by inferior C. C. without an
application. e. g. when arrest is under final process of in-
ferior Court, Officer's justification must show, that process
arose within his jurisdiction, or at least that it was so laid. But 83. cap. 20.

Vicaral Proceedings. Value of imprisonment.

But the ch. process under this qualification justifies the officer; it does not the original party. He is bound to know the extent of the Court jurisdiction, & to shew it & when the cause of action arose. Bro. I. 314. & if the officer, &c off. (now plff.) is not bound by having pleaded to the first action. Esp. 330. Bul. 83. & Recd. 170. Ment. 369. 2 East 263. 2 Edw. 176. 7. (S. Ray's 239 denied that our original plff. is liable in this case. Wilts. 153. 1 Bent. 236 are cited. See Court 20. S. Ray's 230. approved in this point in Com. by Law & Willoughby Kirby III.

In some cases process is void, & the party & the Court liable, when the jurisdiction of the C. over the cause is complete, as to subject matter, person & place.

II^o. In cases of limited jurisdiction. e.g. when an authority given by Stat. is not strictly pursued. Esp. 331. 337. 360. 114. Bul. 408. 1 Ettr. 70. - When a Justice committed plff. for killing game, tho' he had sufficient off. etc to answer the penalty - Off. in excuse - but the illegality of the warrant was not proved. (Wilts. 153. Esp. 332. S. L.) When person was committed on Stat. penalty of 13s which he offered to pay, but was imprisoned by Constable etc. he paid the fees which the Stat. did not allow. Then the constable was off. This was for abuse of process, no question of jurisdiction. So w^t c. commissioners of Bankruptc^y, for any commitment, not authorized by the Stat. powers. Esp. 331. 4. 100. n. 1035. 1141.

III^o. So, in other cases the process is over the C. of Westminster, or any Court, aside from any objection to the jurisdiction of the C. is called vice, & the off. etc.

Pecuniary wrongs; & also Impersonation.

group liable to this action. If he is liable by reason of some irregularity, e.g. a capias returnable the next term, but one to that of the issue. Esp 329. q. 3 Com 491. 3 Wilts 344. 15. 2 136. N. 845. Sal 700. 1100 C 315. - Officer not liable, 3 Wilts 340. in this case if the group is from the Co. of Westminster, &c., & tho' the irregularity appears on the face, same rule probably in Co. R. I.

III. So, tho' the original arrest were lawful, yet for any subsequent oppression, this action lies agt. the officer or the magistrate if he is in fault, e.g. wanton cruelty in confining in a dungeon without air &c. Esp 332. re cited, 1 St. N. 336. Commitment by military comr. under jurisdiction of magistrate here also & no cause.

When an officer justifies, proof that he acted as an officer is sufficient as to that of fact. He is not bound to show his appointment. Stra 1005. 3 St. R. 630. 4 Wilts 386. 2 M. & S. 485 &c. Q. u. may not this be rebutted?

Of Irregular process.

General rule: An arrest under an irregular process is void: so under a process of arrest, founded on an irregular proceeding. E.g. arrest on an exec. issued on a judgment. Set aside for irregularity. Esp. 329. 391. 3 Wilts 124. 1 Stra 509. T. Ray 73. 2d. tit. vacat. 1 Par. 95. 1 Edw 272. 1 Wilts 155. said that the officer serving the process is not liable (q. s.). 391. See in case of Lord of Westminster. 1 Wilts 345. Q. u. if the Co. is of limited jurisdiction & irregularity appears. 2 St. a 493. 4.

Rule on arrest, or an erroneous process is good. 4 Barb 430. Stra 504. 3 Wilts 345. Esp 391. Then for the party to justify under erroneous process, till it be removed. 3 Wilts 345.

Private Wrongs 3 False Imprisonment.

Proof has been helden irregular proceedings taken up without proper authority. e.g. when in Eng. the master of the like a blank for entry, to fill with the name of a "Wality" sup. Eng. & Wilts. The person serving was the person serving the process. He does not appear that he knew of the irregularity. Inferior authority e.g. Sheriff's warrant. Same as see Stat. 24 387.

Will abates when directed to an indifferent person unless the name is inserted by the magistrate. See writ drawn by Staff except in their own cases.

So where the proofs have been given informally. The expense of the witness &c. of record. Custom original p. p. making oath of his cause of action, & that he "believes" he swore that he suspected it. Sup. Eng. Stat. 498. Only the officers & factors not the master being joining in complaint. Stat. so adds. the officers & factors might have testified. See min. 24 385. & the whole said to be counts not judgements.

The meaning of it above is this according to judge R. The Chancellor of S. has power to hold a Ct. by Stat. for the benefit of the Students. The Stat. requires that the person, who comes to this Ct. shall come to swear before the Chancellor, that "he believes" a certain thing to have been done, as e.g. property stolen & till this is done the Chancellor cannot issue his warrant. The party sued is compelled to tell the Chancellor about his warrant, & on as an action lies w^t the Chancellor the Officers & the Goods a false imprisonment, or all his trouble they incur in the suit. But says the Judge that the Officer & factor justified, they will have been released, as th. deft did not appear on the day of the process.

Private Wrongs; & False Imprisonment.

So where the writ is not returnable on a day certain; irregular. Esp 330. Cro. 314, 2^o y. 2. 67. 6 pl. 33. 2 W. 26. 10. 10. 81. Esp. id. the 24th. &c. of the Marshalsea.

But this rule applies only to minor proceedings, which obtain once given, even in case of minor proofs. well. Coup. 21. 21. 8. May. 6th. adjudged sufficient.

Idea 200. as to our Sup. & City. Cols. which have statutory, established by general Stat.

Search Warrants.

Warrants under General search warrants are illegal. So are general warrants of any kind. As a warrant to search "the premises of a libel, wherethy are esp 399. 1 Recd. 6. 1503. Wills 275. 1603. 213.

Requisites to Search warrants: 1^o Granted on oath. 2^o The Grounds of suspicion declared. 3^o Executed in the day time. by a known officer, & in the presence of the informer. 4^o directed to a particular place (as the particular person on whose habitation &c.)

When the requisites are observed, the informant is not required or not by the court. Esp 399. 2 W. 26. 29. 2.

When the officer serving a process, justifies under it, he need show only the writ, or process itself (Esp 333. 337. 66052. 2 Recd. 563.) & that it is returned if no minor process (Esp 337. 2 Shra 1184. See Coup. 20.) & the return day has arrived.

In Eng. Sh. 1661 under officer not obliged to show the warrant, because it is not in his power. But the majority of the officers showing a return, obtains only in case of minor process. Coup. 20. 56090. 4. 267. 2. City. 17.

If the original p[ro]f is right, he must show a judge.

Private Wrongs. False Imprisonment;

as well as upon a case of false proofs (Cap. 333. 4. Sal 408. p. 10), no man may have been seized before the arrest, & left untried, & ought to take notice of it.

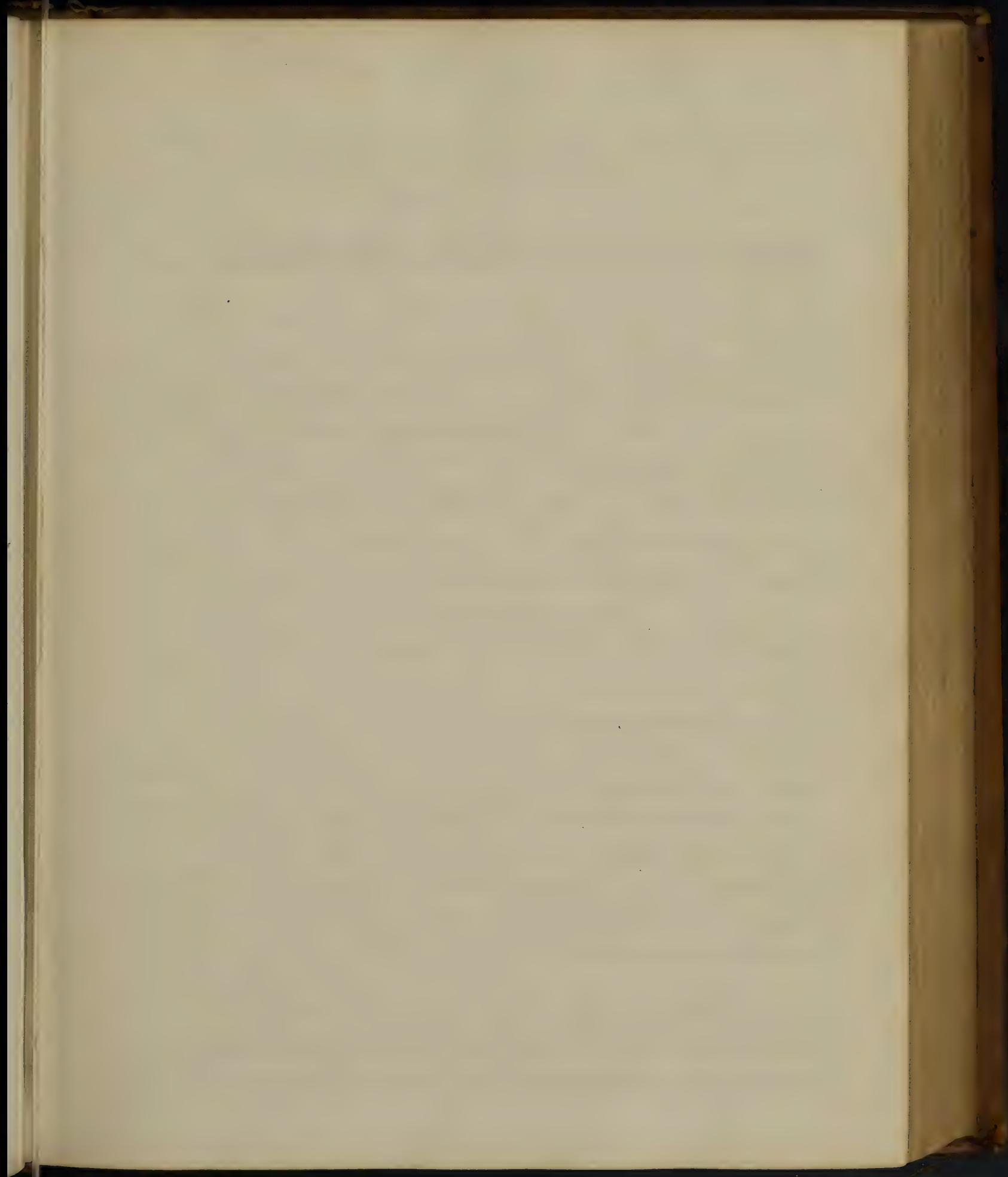
Same rule when the action is vsd. a man stranger who receives the service of process for another, & does it he acts in aid of the officer, & at his request. (6. Sal -

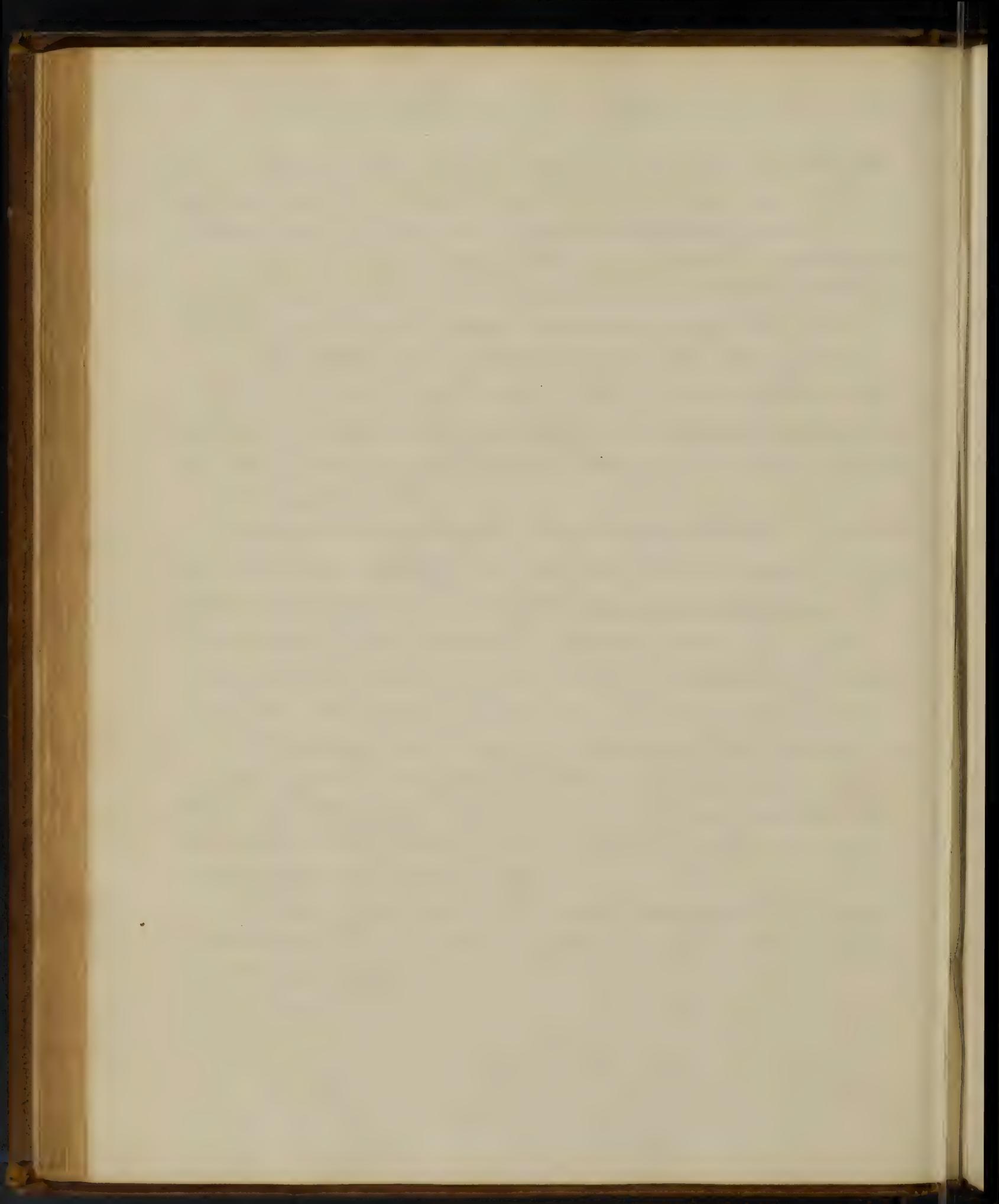
If a Sh. ff. does not return a writ when he ought to do it for mistake, (also return) he may be treated as a true party at .nitis. 5 Com. 581. 2. Rule 563. 5 Bac. 162. Sal 409. L. Ray. 632. The sh. is more omisive, for the return is necessary to complete & validate the act.

If original & pff. to officer are sued together they may serve in detaining - if they join the pff. of justification is insufficient for pff. &c. is so for officer. Cap 336. Stra 993. 1184. 509. So E. Convoce, if pff. is not good for officer, but for original pff, he loses his defense by joining. 76. p. 336. Stra 1184. 166. (L. Ray.) 2. q. Officer does not shew certain of pff. proofs when he ought to do it.

Procuring, commanding, aiding, abetting or inducing a suspactor principal - Code 572. 1. Sal 409. 2. Hawk 512. Reward helping the King of a room, knowing that one is imprisoned in it, is guilty of false imprisonment.
3. Hawk 377. 4. Com. 574. 6 Com. 572.

Procuring over a sovereign's prison, though few to impinge on it is false imprisonment in the procurer
2 Bl. C. 423. 3. 105. 5. 1





Friendly Writings

Action on the Case for Malicious Prosecution: by Mr. Woodrow.

This action is to recover damages for one who has suffered an indictment or other prosecution brought on action by plaintiff from a corrupt motive, i.e., malice, without any ground or probable cause. S. N. 10. 116. Esp. 525. 27. 8. 113ac. 61.

Analogous to the old action of conspiracy which is now much out of use. Conspiracy lies only w^t two or more, for having falsely maliciously prosecuted the plaintiff for treason or felony, & thus endangered his life. 1 Sand. 23. Finch's L. 305. 3 Bl. 176. 2 Buld. 271. 1 Sand. 230. Esp. 530. 1 Com. 108. 2. 1 Kng. 379.

Another analogous action, is the action on the case in nature of a conspiracy.

Action on the case in nature of conspiracy lies, when two or more conspire, to prosecute another maliciously, & without cause; & otherwise conspire to injure him in person, fame or property. Finch's 305. 1 Com. 108. Esp. 530. 1 Bl. 61. 1 Sand. 230. 2.

The gravamen in action for malicious prosecution resembles, in some measure, that of slander. It is not necessarily or generally the danger to which plaintiff has been exposed, but the vexation, expense & scandal. 3 Bl. 127. 10. 110. 219. 2. 10.
Str. 641. 1 Com. 13. 14.

Action of conspiracy lies not, unless plaintiff has been actually prosecuted, Esp. 527. 8. & acquitted (12. 60. 2. 3. 6. 10. 8. 11. 10. 112.) for doing the words of the writ. S. N. 10. 114. 116. 2. 60. 1. 11. 2. 11.

Fictitious Persons. Notorious Factions.

178000. 16. m. 16. has come up for consideration elsewhere
the has been unlawful conspiracy as above the truth
is recited. 3. Count of 16000. Esp. 535. Action on the case
in nature of conspiracy lies, the no indictment, it has
been reluctantly exhibited. Wm. H. Weston. Case No 158 and 223.
in Superior charging a course of conspiracy - failing
to repudiation.

do, difference between action of conspiracy & action on
the case in nature of a conspiracy - In the former, if all
but one are acquitted, judge cannot go vs. him - in the lat-
ter, judge may go vs. one only. 189. 530. 2 Neff. 379. 1600. 169.
Bull. 14. 1600. 210. 2 D. & S. 52. 1800. 111. 112. pl. 5. St. Ray. 176. 3d. 6504. 08.
6 Allod 169. 610. 61. 239. The first is a general suit in the Regis-
ter. 1800. 211. 618. 13. 460. the latter a special action on the case.
In the former, the danger to which the conspiracy exposed
the plff. is the first - in the latter it is the consequent
damage, scandal to Court. 416. 3156. 126. 7. Bull. 14. 1600. 214.
St. 691. 18 and 230. So in case, for malicious prosecution.

The latter (i.e. on the case in nature of a conspiracy) is substantially an action for mal^e prof^t with this difference - that the latter may be b/w. two, another being concerned the former must be b/w. two or more, & w^t one charging that he with another or others has conspired &c. b/w. them. The grounds of the two actions, are therefore the same. Esp 531. 2. 5. v. 52. 6. v. 6. 17. 30. 239. Bills v. City 14970. 16. v. 2307. Knif^o 176. 3. v. 200. 408. But 14. & the two are said, judge may be w^t one only. It.

Fee of 2000/-, Due. B.M. 14. Oct. 2nd 6.15.
The case is value of 15/- for medical fees & cost.

Private Wrongs of Malicious Prosecution.

all unknown to L. Law. 3 Rev. E. S. 58. First originates in the reign of Edw. I. framed by his direction, but sanctioned by Parliament. 2 Rev. E. S. 239, 328. 3 H. 127. The latter are derived, I suppose, from the Equity of the Stat. of Westm. 2. - 2 Rev. 20.

It is pertinent to the subject of this action (for malicious prosecution) that malice, & want of probable cause in the former prosecution should have concurred. Malice without Falsity alone not sufficient. Bull 14. Esp. 529. 4 Wm. 1971. 1st. T. 544. 5. If lies, ergo, no one who maliciously promotes a false prosecution, notwithstanding, knowing the charge to be false, or having no reasonable ground to believe them true. But it is always sufficient for Dft to show probable cause, whether he acted with malice, or not. Bull 14. Esp. 533. £200 & 400.

In Eng. when the action is for a false & malicious civil suit, it is called a vexatious lawsuit. This division pursued i.e. the Com. distinction will be observed - 1st of criminal Prosecution, false & malicious to

If a person is falsely & maliciously indicted for a crime that w^t injures his reputation, he may have this action - 2^d 15 yell. 46. Hal 14. So if the charge exposed danger for his life or liberty. Hal 15. When indictment false & subjecting to expense only, is sufficient to support the action. L. Ray. 378. Hal 15. a. g. Stiles 379. Esp. 528. See 977. e.g. Husband sues alone for expense incurred on a malicious prosecution of his wife - action lies

Examples showing that danger to the life or liberty is not necessary. The indictment having been ill-

Private Wrong;

Malicious Prosecution.

such party as is in danger of a conviction, is no answer to the action, if the charge injures his reputation &c. Esp. 528. 4 H. 2d 48, 3 Bl. 127. Sac 15. 118a. 61. Scandal & vexation & expense sufficient.

No. if the indictment in the last case, has not been found, by the grand jury, yet the action lies, for the vexation & expense, scandal &c. Esp. 528. Croft 490. Sal 14.

So expenses alone, caused by insufficient indictment will support the action. e.g. indictment for exercising a trade without license - the reputation of the party is not injured, nor his personal security endangered. Sal 15. in margin. 3 Bl. 127. 10 Mod 148. 2 14. 6 Mod 25. 73. 137. 118a. 61. Esp. 528. 2 Str a 977. Sal 14. 15. Com.

Public officers commanding prosecutions for false information not liable - but the person giving it false information, knowing it to be false, or without probable cause, is. 18a 187. Croft 130. 2 H. 2d 281. 118a. 61.

But if a public officer without information, & of his own mere motion, maliciously &c. prosecutes another, (Com. 161) he is liable. 1 Baile 61. 2 T.R. 281. 225. Croft 130. 1 Com 158. [How the officer acts ministerially]

But if the public officer in the last case, is the magistrate granting the warrant & the gravamen is, that party was arrested under it, perhaps not even in the proper remedy. And in this respect the case in the C. 130 is denied. 2 H. 2d 281. Esp. 530. see Doug 650th Ch. Unprisonment.

It will always appear from the declaration that the prosecution for which it is, is somehow

Private Wrongs; Malicious Prosecution

at an end. In conspiracy, legitimo modo acquitatus
meritabilis est. 9 60. 56. 8. Corp. 205. 10 Mod. 209. 2 St. B. 281.
Hob. 267. 18 Str. 114. "Off' was discharged from prison" not
sufficient if because notwithstanding the discharge from
prison, the prosecution may be still pending.

But the omission to state that the prosecution
is at an end, is cured by notice. Therefor no damage
can be recover'd of it, only by special demurrer. 1 H. & C.
228. Esp. 532.

An allegation that party was acquitted in the
original prosecution, not supported by evidence
a non pros. for this is not an acquittal. Hob. 14. 10. 536.
Hob. 21 before 261. The declaration states all the pro-
ceedings in the original prosecution, & any misre-
cital in a material part of the indictment ent. is
fatal. Esp. 532. 3. 4 St. B. 390. 2. q. a variance between
the original record & declaration, as to the day of
acquittal. before 216. - Secus if it is in an impari-
al part. Esp. 532. 4. 138. 10. 1050.

It seems that no civil action lies agt. jdg.
or of record, jurors, grandjors &c for any malicious
acts done in the exercise of their judicial powers.
16 Com. 158. Esp. 635. 10 St. B. 560. 13. 14. 534. 5. 7. 8. Corp. 161. 172.
17 Hawk. 191. 2 Kew. 6. 8. 328. 2 138. 10. 114. 1. 12. 1033. 34
2 Mod. 219. See Cro. 130. "Habeas Imprisonment."

Malice may be, & generally is, inferred from the want of
probable cause. 4 18 Str. 1974. But want of probable cause can
not be inferred from the most trifling, malice. 1 St. B. 54. 42.
Esp. 524.

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To prove malice pft. may give in evidence collateral circumstances, as an advertisement by Dft. that the indictment was found, &c. Esp 535. Atta 691.

Conviction of the, left in the original prosecution, by a competent jurisdiction is conclusive evidence of probable cause. Esp 529. 1 Wilts 232. Rob 267. Bull 262.

Acquittal is in most cases presumption, but never more than presumptive evidence of the want of probable cause, not always infallible. But being presumptive evidence it throws the onus on Dft. to prove probable cause in most cases. Cf. 520. 1 Wilts 432.

An acquittal even on a defect in the original pro-
cess, is presumptive evidence of want of probable cause,
i.e. in most cases ut supra. 4 St. B. 247. Bull 15. pl. 5. But see
whether ignorance favor is prima facie evidence of want
of probable cause.

Acquittal not always prima facie evidence of want
of probable cause. e.g. If the pft. was bound over by a Ct.
of Enquiry, or the bill of indictment has been found by
a Grand Jury, on no generally lies on pft. the acquitted
on the trial; presumption being in favor of complain-
ant, i.e. Dft. Esp 536. Bull 14. Bull 15. So if it appears from
the report of the judge that there was probable cause.
Bull 14. Esp 529. 30.

But where the facts lie in the knowledge of Dft. him-
self, he must show probable cause, tho' the grand jury
have found no indictment &c. Bull 14. Esp 530. e.g. prosecu-
tion for robbing ~~re~~ ~~rob~~ a bank,

the proof of all evidence given before the grand jury

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is good evidence of probable cause. Bull. 14. Esp 535. 536. 537.
b.May 216) & Dif't's oath, at the original trial, as to the existence of the crime, charges, is admitted if no other person was present at the time. e.g. *supra* of prosecutor robbing Dif't.

The existence of probable cause is a mixed law, partly of fact, partly of law. What amounts to probable cause is a law of law mainly, i.e. whether the circumstances alleged to prove probable cause are true is a law of fact but the fact being given, the inference is a conclusion of law. 1 St. R. 545. 519. Bull. 14. Esp 529.

Therefore regularly write, please, when the grounds of suspicion on which he acted. Cro. 8. 134. Esp 533.

So it seems necessary for Dif't to show, that y^e crime for which he prosecuted was committed. *Secus* (scmly) there can be no probable cause. Esp 534. b.May 216. Clinton 83. Haf-kins, 2 Hought 120.) e.g. Dif't. believes his property to be stolen, when it is not..

So what amounts to malice (or the existence of malice the facts being given) is a law of law. 2 S. Ray? 1493. 17 R. 519. cases citabg. with 233.

When the action is for a malicious prosecution for felony, a copy of the record granted by the Co in which the trial was, is necessary - & the granting is discretionary. Esp 534. 183 L. 385. 17 Bac 61. When the crime charged is a misdemeanor only, such copy not necessary. Esp 534. 183 L. 385. original produced by Clerk sufficient.

III. When the action lies for a ground less civil suit - a negligent law suit.

General rule is laid down, that the action does

Private Wrong. Malicious Prosecution.

not lie, for bringing a civil suit over the chm is no right of action because it is a claim of right, plff is amenable, profuse clmnce, & liable for cost. Bul. 11. Sec. 13. 14. Esp. 525. 1 West. 205. do no damage presumed. Secur for criminal prosecutions.

To this rule there are exceptions following viz:

I^o When there is good cause of action in favour of one & another having no authority to sue & arrest the debtor, the action formal^s brought, & lies. Esp. 526. Bul. 12. Sec. 14.

II^o When plff on the original suit having good cause of action, sues in a C. not having cognizance, the action lies. 4 C. 14. Will it be necessary that y^e Date of original plff should have known that the C. has not cognizance. Esp. 529. Bul. 12. 2 Will. 322.

III^o If a person having no right of action, nor color of right, & knowing it to be so, sues another for the impo^r of recovery, he is now liable. (2 Will. 305.) no such cases in the old books. West P. 388. 166. 129. 3 East. 316.

IV^o So, if the sue^r proposes he sue^r him for a much greater sum than is due. 1 Land. 228. Esp. 525. 6. 16 Eliz. 424. But it is said that the action will not lie in the last case for according to 1^o plff has been forced to accept the suit. Esp. 526. Bul. 12.

When the suit is utterly groundless & known to be so by the original plff, tho' but in a proper C, & in course of the process, not merely prof^r taken action lies. Esp. 527. The first suit will be no malice. & C. has suffered a 2^o fit. a. & sold plff goods & it after having taken other goods under former fit. an action lies for exaction of damage. Hob. 205. Bul. 12. 2 Will. 266. 262 page.

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The particular gravamen must be, that, "in his course on former civil prosecution, & that it was done maliciously," and "with intent to injure & deprive the plff." 2 Wils. 305. Esp. 532. 1 Stat. 14. 18 Ed. 424. 2 Ray. 380. So "on purpose to hale plaintiff to baill," if that is the injury. Stat. 15. Bull. 12. - & so damage being presumed - into.

Qn. whether unmeritableness, arresting a Debtor, from home, without any particular benefit to Creditors, but from apparent malice, is a foundation for this action? Decided not to be by our Jus. Et.

In the above mischievous cases, it is necessary that special damage be laid & proven. 1 Stat. 14. 15. 2 Ray. 374. Secus, if a stranger invites & to bring a groundless suit. 18 Ed. 13. No special damage necessary as w^t him (as in crim^c cases) nor a claim of right by him - he not amenable (Stat. 14 2 Ray. 380) nor liable to costs.

Two requisites in all cases to support this action, is a civil suit. 1^o Former action determined, i.e. ended, for it cannot otherwise appear to have been ground for unjust. 20 Aug. 205. Stat. 15. -

2^o Damage, (i.e. actual,) already incurred, or immin-
able. Esp. 527. 531. Stat. 119. 18 Ed. 13. Therefore if one forgoes
bond in my name, I can have no action, till sued upon it.

But note necessary that the previous suit shall have
been decided in favor of the present plff. e.g. nonsuit, say,
fired on the original action, yet this lies. Esp. 527. Stat. 13.
Any ground less proceeding by action, when ended, is, on this
point, sufficient. Esp. 527.

Our Stat. gives an action to all who willingly,

Private Wrongs

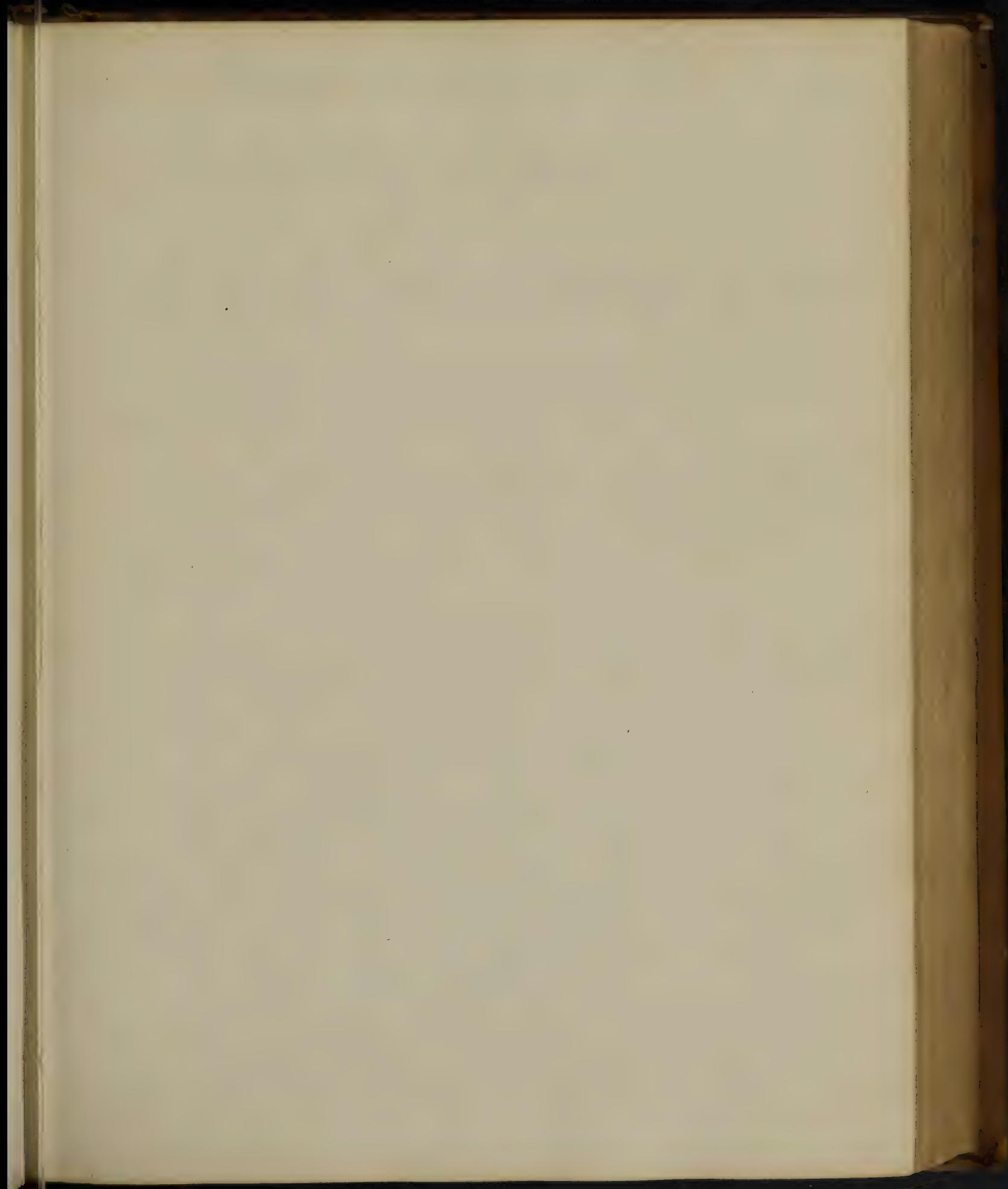
Malicious Prosecution

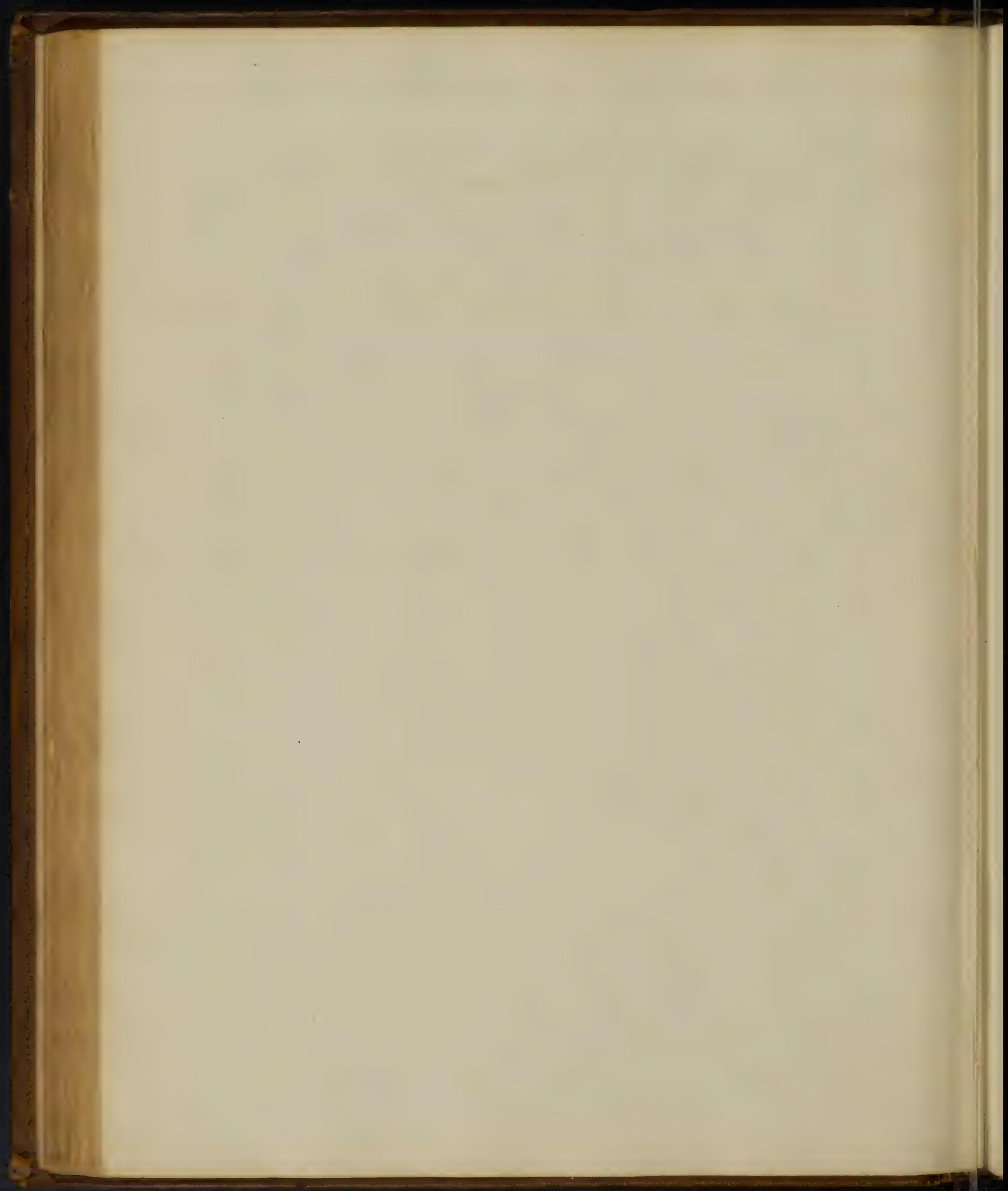
& willingly among others by prosecuting any suit, &c.
with intent to vex trouble &c. & trouble damages. Stat 429.
It also subjects to fine of \$7. for this offence to be pro-
cured against as a common bannister. Ibid.

Two cannot join in an action for a vexatious suit...
the injuries being separate & personal. Kirby 145.

But there may be two 100s f G, secmb 134 L 5.
134a 79. 2 Hla 910. Esp 537.

Whether damages may be recovered in this action
against several. See two cases contrary. How can
they be several? Esp 537. 134a 79. 2 Hla 910. The malice
of both enters into the consideration of damages. Esp
537. Not damnable by our practice N.D. 433.





Private Wrongs.
Action of Trespass
for
Injuries to Personal Property. (by Mr. Gould)

Trespass, in its most extensive acceptation, at L. 2^o, is any transgression of law, short of treason, felony & misprision of treason or felony. When, not considered as a word of technical import, it is any violation of any law. 3 Bl. 208. Gads. Dic. 5 Bl. 157.

The word as, now used in Law, denotes in its general sense any misfeasance committed to the injury of another's person or property. Esp. 380. 8 Com. 674.

The word in its most appropriate sense, imports only injuries by force, to the real or personal property of another. Esp. 380.

The Trespass now to be considered, comprises all, forcible injuries to the personal property of another. Esp. 380.

The right of personal property in possession liable to two species of injury. 1. abuse or damage, while the possession of the owner or continuus. 2d. emption or deprivation of possession. 3 Bl. 140.

1st. If abuse of personal property without attorney, i.e. suspicion. E.g. Poisoning one's cattle - killing his beasts - doing any act, which takes away from the value of a chattel, falls under this description of injury. 3 Bl. 153. 3d. Loss of timber, floats.

The remedy in these cases, if the act is accompanied with force, is immediately injurious, is by Trespass in the arms. 3 Bl. 153. 8 Com. 582. 2 R. 556. C. 17. Esp. 698. If case is lost when trespass is a proper remedy, judgment remitted, twice over. 8 T. R. 128. 2 Mod. 101. Cro. 6. 141. 196.

Vivat Vincit. Vivat Vincit. Vivat Vincit.

the following distribution of species? This species
of course, so far as it is concerned, belongs most conveniently
to the genus *Leptostoma*, and is best defined by
the name *Leptostoma* *giganteum* Gmelin, 1791.

The action of Shumpert will arms you in damages, not restitutions in the case. The Plaintiff will have not a substitution of the specific article or property, but a sum of money. He has not, in taking his ship and goods, a prize, the the property has been adjudged to be no prize. See the Dec. 2000 on the Law of Nations, Section 6, in Admiralty, etc. only. Page 322, 323.

But on some instances when the original taking is too
firm, causing & leading to subsequent injuries. See 381. E. S. It is most
evident when the tray, & the handle of the spoon, touch each other.
This happens at times. (See 347. M. N. 12. 360. 14. 6. 3 Con. 380. 1. 3. 80. 20.)
The same result frequently lies not:

Rule: When the authority to do the criminal act is given by law or a clause of the authority makes the trespasser ab initio. Esp 383. 500. 560m. 581. 21. 1828 81. 2136. 16. 12. 81. 6 Mar 161. 860146^a & b. 2. 1828. 561. 1426. 96. 7 1837c 36. 8 1837c 20. 1838c 20. 1827c 121. 8. 9. 1. 1837c 18. 16. 121. 1426. 221. So if a person enters a dwelling afterwards stealthily he is a trespasser (by relation) in entering. 860140. Case of a man who goes into a house.

So it's a chff. does not make return of a unit, where he ought to. E.g. memo prop. 8 Com 581. & Rec 583. C. 15. 20. 8 Dec 1820. Job 37 ff. in the above case neglecting to return a, iron, is regarded as a case of a violation tho' it be a mere nonfeasance. In this case, however, an exception to the general rule above laid down, that chff. app. denotes in its general sense any nonfeasance etc. see 2^d paragraph last page. 8. 5. f.

But the subsequent rule of the right, thus given by Com. must

Private Wrongs; Actions of trespass upon Person, Property.

be positive - a misfeasance, not a nonfeasance or a case of a
Trespass against whom he doth plote. But he would not have been
a trespasser ab initio for refusing to pay the tennant for con-
tentment. Rep 383. 5 Ed 2 c 161. 8 Ed 146. 5 Wm 312.

If one having taken a horse lawfully, refuses to de-
liver, or tender of his service, am 25. & 26 Ed 381. 2 Rot 555. dis-
trivver of goods etc. However injury is remedied by case. 1 Macc 12. 130.

Exception to the rule, in the case of a bailee who
omits to return a boat. 5 Bac 162. Gal 409. 2 May 6321.

When the party gives the license, under which no original
act is done, the other can never be made a trespasser by revo-
cation. Park 191. 2 Sat. 64. 2 Rot. 561. 8 Ed 146. 5 Ed 96. 7. Another can
will furnish in case of abuse of the very act, which was author-
ized by itself, yet it will not allow a party to treat that
as unlawful, which he himself made originally lawful.
5 Bac 162. pl. 22. E.g. unlawful & lawful or abuse by bailee.
1. 3 Corn 381. Con. Rule in Corn. 381 denied 5 Bac 162. pl. 20.

If indus bailee destroys the thing, but, as he is said to
do for he extinguishes the bailment, but is not a trespasser ab
initio. Contra ill. 871. Codic 57. 2 8010. 6. 248. 5 Bac 266.

To maintain this action, plff. must have possessor
property alone is not sufficient. Rep 383. 4 27 N. 489. E.g. If ff. let a
house & furniture to J. S. & ff. pending the lease, he can
action on the furniture, as belonging to J. S. If he has
pos. - adjudged not to do - plff. not poss. - it shant have him
soever. 1. 16480. now holdor that tenn. will not. Ex. 70710. 9.

But construction poss. from, is against stranger in general.
3 Corn 577. 8. 5 Bac 164. rebailee. 1. 3010. 8 Bac 164. 1. 3. 16. 1480.
4. 2. 16. 432. & 71. 9.

Private Property Action. Description.

He generally any person having the general property may
into it a Sub-servient tenement trespass, and draws to itself a pos-
session in law. 5 Bac 164. 5 Com 578. 2 Buls 268. 12 Ed 438. 2 Roll 569.

The owner of Cattle may maintain trespass, &c. in Strang-
ing or in taking them. 5 Com 577. 2 Roll 569. l. 25.

The general property contemplated by this rule must sup-
pose a right either absolute or conditional, of present, possession.
As, as in case of Bailee to keep, pawnee, &c. etc. it is contrary
to 4 St. R. 480. 10 Ed. 480. 7 Ed 383. Suppose the case of a Borrower
for hire, for a certain time.

So he who has the special, right, in goods, may bring
trespass. 5 Bac 164. 5 M. B. 89. qu. 100. 5. 89. 4. 6084. 2. Roll 569. Same
generally as in horses. Bailee & Master may both maintain
the Action. 2, 2, 4.

If bailee delivers the goods to a stranger, bailee can
not maintain trespass, tho' in good case he may have
anted. 5 Bac 164. pl. 18. 175. 16. 30. Means if bailee has only the
bare custody, as a servant. 5 Bac 176.

If property is given to one, he may maintain trespass
before he has taken possession. 5 Bac 164. 2 Buls 216, pl 10.
for property draws a possession in Law.

If goods of testator are taken away, before the will
is proved, Executor may maintain trespass, after proving
the will. 5 Bac 164. 2 Buls 268. 10. R. 480. He has by relation
a constructive possession from testator's death; his right
is from the will - not the Probate.

So legatee of specific goods may maintain trespass
for taking after testator's death, tho' he before delivere
them to testator. 5 Bac 164. Alter of the legacy, "a 'thief'"

Vicar v. Wm. & J. Action of trespass upon person & property.

of his laborious goods, not specified in the first instance, etc. it's supposed that trespass w^t not lie, if the taking was before exec^t of a bequest to the legacy. 1 St. W. 480.

In trespass for goods taken off belonging to two, both would join; but the defect is remediable in abatement only. 16 Ch. 12. Parl. 32, 33 & 34. 1 Rec. 31. Esp. 586. 411. 1st 4. 2d 8. 323. 820; as robbery, grand larceny.

It seems that ac. to C. S. trespass does not lie for an act amounting to felony, as robbery, grand larceny &c by reason of merger. 56 Com. 582. 32. 15. 3 H. Sac. 176. 1 Eur. 21. 97. 1 Com. 130. July. 90. 1 St. 376. 2 1000. 557. 10. 1100. 2 83. 1 Son. 148. 2. 1. 144. 3 Roy. 82. English authorities contradictory as to the application of this principle. No such principle here. Merger found on forfeiture; Comb. L. 873. 8. 162. 2572. 3 St. R. 176 argued Com. 11. Rule 131. I cannot understand.)

If a Sh. or under Sh. takes the goods of one, or another, or others' Sh. liable in this action. wrong 40.

In declaring the goods must be described with convenient certainty. Esp. 405. 6. 16, "w^t goods" or "peff's goods" not sufficient, nor even by Verdict. For an recovery w^t not be a bar to another's defc. c^t not justified. 2 L. Ray. 1410. 4 H. Bar. 2455. Stra. 637. 5 Co. 33.

But this rule applies only where the action is founded on the taking of, or injury to the goods themselves, not where injury is laid by way of aggravation. Then, "peff's goods" generally is sufficient. E.g. trespass for breaking & entering, peff's house & "spoiling his goods," sufficient. (Esp. 406. 3 Wil. 2d) even on special dem.^s

Trespass lies for breaking & entering house, & spoiling peff's property, only aggravation, unless peff. makes a new representation of it as a substantial trespass. (case of novel agriment. 1605 & 1793, 32. 16. 247. 176. 13 C. 555. 1 W. 1. 217. 2 Wil. 313. 3 Wil. 20. 4 13 ad 17.)

Private Wrongs; Trespass upon Person's Property.

So, a general description is sufficient if it is made particular by reference to other things in the description. Esp. 406.

Eg: Several Keys, for opening the doors of th. House affrs." Bac 643. Went. 114.

Trespass of a permanent nature &c may be laid with a continuance. Esp. 316. 407. 3. Bac 688. 2 May. 239. & Chanc. does it dubious 9. 318. 217.

Saying with a continuando when the acts lie not in continuance, not cured by verdict, unless some of them lie in continuance. Esp. 403. Bac. 639. Went. 16 Chanc. page 1.

Off. must be in possession or property & having a right of possession, i.e. either an actual or constructive possession. Esp. 406. 383. Bac 644. "From p^rff's person" not sufficient. Nos. 46. 45. R. 490. 156. 480. 2. 3. 136. Taking "way from p^rff's land," not sufficient - Reasons, in these cases, not good even after verdict.

Value must be stated. Esp. 407. 1 Bac 196. 1810. 34. 2. Law 2. 30. 2. 430. Cro. 8. 129. 3 Com. 349. 2. Went. 174. (Esp. 588 that value need not be alledged in trover, - ante.) Admitting an amount of value cured by verdict. Esp. 407. 5. 1 Bac 196. 81d. 39. 4. 18ur. 2. 450. argued. L. & S. 124.

Pendency of another action w^t. the same party or parties for the same trespass is a good plea in abatement. 5 Co. 61. 16 Com. 49. 30. 110. 17 Bac 13. Cart. 96. Decay of the other action for the same trespass is w^t. a stranger. 1 Com. 30. Hob. 138. 4. 13 Bac 48. 2. Hob. 420. 5 Bac 192. pl. 15. 4 Bac 48.

Day is not material - p^rff. may prove trespass at any time (not within ch. Stat. Limitation). Esp. 407. 321. 319. 415. Bull. 17. L. Ray. 231. 60. 2. 283. Cro. 8. 32. Hob. 104. Therefore if a release is pleaded, deft. must traverse as to the subsequent time. t. esp. 415. see 5 Bac. 106. 7. Bul. 38.

Private Wrongs; of Action of Trespassion. Person: Party:

Pf. by way of aggravating damages may lay in his declarat^t. things, for which he v. not have an action. Esp. 407. Feb. 13. 196. Tal 119. 1 Stra 61. 1 Rob. 787. 2m. As it to aggravate, num. 3 ante "Assault & Battery". Esp. 317. Tal 642. L. 12 of 1032.

If trespass is committed by several, pf. may declare more or, more; or all. So he may vs each one separately. 5 Bac 192. 3. Stra 420. As to serving of damages see.

If on a judg^t against several, one is compelled to pay the whole, he cannot oblige the others, to contribute. rule common to all torts. 7 Card 164. 8 J.R. 156. Kirby 116.

But if it appears from the declarat^t that the wife with another person (certain) committed the trespass; the declarat^t is ill for not joining the latter. 5 Bac 192. 3. S.C. 1 Leon 41. Rob. 199. 1 Leon 41. 2m. as to the principle... Torts being several... a husband's pleading or showing the fact, does not limit his declarat^t. Stra 420. Rob. 199. either if the other is not known.

Justification must be pleaded. Esp. 411. Co. L. 282. Stra 61. If justification pleaded by one of several & shows up for you alone pf. had no cause of action, judgment cannot go to either; even if one has suffered a diff^tault, or been found guilty. e.g. a license pleaded, a wife to. Esp. 421. 1 Stra 610. Rob. 54. 2 Rob. 1372.

"Words 'vit et armis'" not necessary in Com. Bosworth 15^t Ch. Lps. In the case cited there was a special damages.

The Eng. "vit et armis," are words Salutatione. Th. ut C. Dan the judge in case of facib^t injuries, was a capias pro libet, in others pf. paid a sum of money, on taking out the original pf. the judge was a misericordia. 4 Bac 11. 2m. amount 80039^t. The pf. will be the judgment etc. Esp. 408. 5 Bac 191. 2. 8. 11. 196. 8. 18636. Corol. 407. Coro. 1443. 5. 26. 536.

Private Wrongs & Action of Trespass upon Person & Property.

Now the writ of capias pro fine is taken away by Stat. 5. Wm. & Mary. When the party pays a substitute or settling judgment in actions for injuries with force vix 6 & 8. These being now nearly rule continuous. 3 Star 191. 3 Cal 636. 3 Ray. 985. Com. 192. 4 Bl. 347. 6 B. & C. 1593. 1 Inst. 66. 3 Cal 636.

To contra paces no words of substance in 3 & 4 Geo. 1. 133a. 192. 4 Bl. 408. 6 B. & C. 1593. 1 Inst. 66. 3 Cal 636.

These disputes aided by verdict & shall be amended (4 Bl. 408. 6 B. & C. 1593. 1 Inst. 66. 3 Cal 636.)

Decided in Com nearly 30 years ago, that trespass & trespass on the case might be joined in one declaration. So late decision. At Inst. such a joined would be ill, because different judgments would be necessary. 860 39.

Now, the Capias pro fine is taken away by Stat. 5. Wm. & Mary, yet the general criterion has still been, the difference or sameness of the judgment. 2 Wm. 32. or 33.

Case for misfeasance & negligence, may be joined with trespass. 2 Wm. 34. Trespass in et amis & crown not joined sive 6. 2 Wm. 32. 18. 16. 274. In Com. the rule as to cases may be different as to the two causes of action. 2 & 3. 268. 9.

The identity or difference of the judgments, is not a universal criterion. Yet when the judgments of general issue are the same, they may be universally joined. 1 T. N. 274. 4 Bl. 347. 6 B. & C. 1593. 4 B. & C. 20.

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Private Wrongs.

Action of Replevin. By W Gould.

In Eng. Replevin is a action by legal process of attachment or goods distressed, 4 Bac 372. 86, 346. &c. 5. 145. 4; for any cause, or security given to try the right & to redeliver if judgment be against him. So distress is the taking of a personal chattel out of the possession of the person due into the custody of the party injured to procure satisfaction for the wrong committed. It is the act of the party injured. Sometimes signifies the thing taken by distress.

Replevin lies not for goods &c taken by a mere trespasser. 2 Liv. qd. Bull. 53. 3 Blc 140. post 2 u Bull 52.

It will not grants bale upon security given by pefl. to try the right of the distressed &c in Eng. & to redeliver the propf. if judgment is for distressor. 3 Blc 13. 147. &c. 5. 145. 86, 347. 3.

In Eng. if pefl. in replevin does not try the right i.e. does not pursue his action, or fails in it, the propf. ist. be returned to distressor, who may have a writ, de returno habendo. 60, 2. 145. 4 Bac 382. 372. 3. So being returned to distressor, he may keep it till tender of sufficient amends - no longer. 3 Blc 147 = 158. 86, 147. &c. 86, 347.

Tender of sufficient amends before distress, makes the distress tortious. if before impounding, it makes the impounding a trespass tortious, not the taking. 86, 147. 2 Wll 50. If the judgment be for distressor, it makes the further delivver unanswerable, at least. 86, 357. 2 Blc 40. 86, 376. 4. Note 381. In the last case pefl. may have damages or I suppose damages. 3 Blc 147.

Private Wrongs;

Hepkerin.

When a distress is taken it is to be imposed in an
immediate chattel in a pound court, which generally is bound
over. No pound court here. 3 Bl. 121. 60 3rd q.

In law, the security is a substitute for the property ap-
plied for. It obligates the bondsmen to respond in damages
merely & the property is not subject to the distractor's in-
any event. Stat. 360.

Formerly owing a distress being in nature of a pledge
it could not be sold. The distractors could only keep it, as a
punishment to the owner of the surety. Stat. 3 Bl. 104. 13.
173a. 188. Statutes have in a great measure remedied this
inconvenience, especially in case of distress for rent, by al-
lowing a sale in certain cases, but not in case of cattle
taken damage frascati. 3 Bl. 10. 13. 14 & some other cases.
There were also various former exceptions to the old rule. 3 Bl. 14.
8 Co. 41. 12. M. 330. If the distress was made in the name
of the King, or to enforce an attachment it C. b. sold at C. Law p.

Writ of Hepkerin is demandable, as a matter of right
if even the rent is granted with right of distress inextricable.
4 Bac 373. 602. 145.

The principal cases in which distress may be taken
by the Eng. R. are two. 1. In case of cattle damage just
ant. 2. For non payment of rent. (The 2^d not in use here.)
2 Bl. 89. 3 Bl. 6. 7. 60 5. 46. Cap 364. & 2 335. In Eng. there are
certain other cases. e.g. neglecting suit, or services for an agree-
ment, poor rates &c. 3 Bl. 6. 67. 60 8. 46. 60 364 & 735.

In Eng. relief may be at C. L. by went out of chy or under
the Stat. of H. 11. 12. by plaint cap 346. i.e. Plff's own process in complaint
made to Plff's magister his Butliff by word to upf. 60 347. st. 11. 13. 164.

Private Wrongs; Actions.

In Eng. suit of replevin lies in all cases of cattle on which distress is taken, except where the distress is founded on a capias in withdrawal. This is a distress by the owner of the original distress, the latter being carried out of the County or concealed, in which case the Sheriff returns the goods & etc. are seized, i.e. carried to a distance, to a place unknown.

It obtains when the original distressor having retained the goods with the writ of replevin, on a claim that they were his own, (which claim is decided against), conceals them &c (ut supra). So if there is no such claim, but the property is concealed &c. Then there can be no replevin. (3 Inst 149. T. & S. 13. 68, 73. 15. Ray. 475.) of the second distress, till the original distress is forth coming. When a writ de retorsione is awarded & the distress cannot be found, scilicet lies w^t the plodger in the writ of replevin. 4 Bac 382. 12 Inst 172. 8 Inst 347. 6 Inst 322. 8 Inst 376. 2. Will 41.

The 2nd. writ of replevin lies in other cases than those of distress; viz. in all cases in which cattle, goods &c are impounded or distrained, attached or seized except upon Execution, garnishee or replevin, or for some cause liable to punishment, marasmus, etc. Plac. C. 360. - Perhaps all the cases, not excepted, in y^e Stat will be those only of property taken under our writ of attachment - so cattle taken damage feasant. 2 Inst 89. 1. of Replevin in case of cattle, taken damage feasant. 2. in case of goods attached.

W^t of distrainment of cattle distrained, damage feasant.

In this case the owner of the goods, has his election to bring his goods in to distrain, & impound the cattle. But if he distrains & the distressor sues his action of trespass in y^e case, unless the escape was without his fault.

2 Inst 412. same rule in case of the cattle dying. 3 Inst 179. 12. Will 633. 663. 2. Ray. 770. 8 Inst 248.

Private Prongay.

Replies in.

In Eng. the proceedings in replies are tedious, the
owner must issue out of Chy. the goods &c. were thus long
detained from the owner. 1st Stat. & Barb. 52. Recd. 3. the Plff.
is enabled to apply immediately. 4 Bac. 373. 31 & 147. T. & S. 1368. q. 13 Co. 31.

If a dog or bull or taking body of a bull, & impounding
cattle both ploughs. 2 Bac. 354. If man not satisfied by death,
nor by recajo, in life the party impounding is in fault. &
both, ploughing hollow, no other remedy. 5 Bac. 179. 12 & 13 Co. 663.

In Eng. when cattle, taken damage, & scarce, are im-
pounded, the owner not only may have replies, but after
notice, he must apply, & redem them within 24 hours,
or incur a forfeiture of 17 pence per head, for every days neg-
lect, besides paying the expenses of keeping, & those forfeit
wants are to be applied for payment of the damage done, &
punishment. Then the sum due to be divided equally between
the Town treasury, & poor & super. (Stat. Rec. 345. 6,) to be de-
termined, by an assitant or Justice, who is to issue & con-
tinue the suit.

In Eng. also, owner of cattle distraining must provide
them until they are put into a pound court; then dis-
trainer must do it. 31 & C. 13. Sec. 2. 47.

If the owner replies in this case, & judg: is given
for & c. is replied. He will recover on the action for
the damage done by the cattle. 2 Sw. 91. then if
exon is not discharged by plff in replies, his bondsman
is liable, & this tho the body of the plff is taken in Eng.,
& he dies in prison, or is discharged. R. S. 200.

Any suit of replies, to cattle taken damage, fees
are sustained in form of action of trespass. & generally

Private Property

Ripplorom.

however, pfeffer ripplorom does not expect to recover damages but appears for the purpose of having off damages off paid. If however the cattle were unjustly taken, pfeffer can claim recover his damages.

The pound keeper has a lien on the cattle impounded for his fees in case of settlement between the parties. W. H. 200. as to this right against a ripplorom.

In Con. if the owner of cattle taken damage peasant is not known, a constable is to be informed, who is to post them in the town, & the two next towns. And if the owner does not appear in a certain number of days, so many to be sold, as to pay the damage, defray the expenses, & in the mean time impound the cattle & support them. Stat. 345. Such Estrays are also to be sold, under certain restrictions, tho' not damage peasant.

Generally when cattle enter onto the insufficiency of the fence of the owner of the land, no damage recoverable. But if they pass the good part of the fence, partly good & partly bad, damages are recoverable, & they may be impounded. So if the cattle are wildly. Stat. 193.

So if they enter from highway; immaterial at C. L. whether the fence is good or bad. 276. Bl. 527. because it is unlawful to prevent them to go at large in the highway.

But in Con. black cattle & sheep are, by usage, commonable; & tho' they enter from highway, yet if the fence is insufficient, no damages. After 1 horses & swine entering from highway. To them the C. L. applies. Stat Con. 193. 346. 408. Note.

A stat. in Con. enables Towns to make any laws

Vivale Wrongs

Replication.

commonable. Stat. 414.408. & then no difference, between
entering from highway, or from an adjoining field. 2 Co.

For mischieif done by animals, from a disposition,
common to the species, owner liable, without notice, or
knowledge, as a bear biting, or cattle trespassing, for
that committed from a disposition, not common, own
or not liable, without science. E.g. a dog biting. 2 D. 25
29. Esp. 601. 2. King's 606. the science not traversable, i.e. Ex-
plicia but must appear true, or false on evidence. 1 Rob. 4.
4 Co 18. 6 Co 6. 350. "ost' action on ch. 8. 5."

If the owner of land chase a beast damage-
ant, on to the land of the owner of the beast, he is not
liable for chasing. If a stranger chases, the stranger
is liable to both. Lact. 120. 5 Bac 172.

Defender not allowed to use a beast distinct.

3 Rob. 13. 6 ro. I. 148. he becomes a trespasser ab initio.

When there is a trial on replication, the Df. may either
deny the taking or show his right to take. Except
only of replication in case of beasts damage peasant. 4 Bac 388.

The general issue is now de petit. 1 Robt. 247. 4 Bac 388.
Bul 54. Upon the issue claim of property cannot begin
on or evidence. So sh. be p. 28., i.e. in Eng. Bul. 54. Gal. 5.
2 Liver. 92. 6 C. 100. 81.

Answry is in nature also of a plea to the replication -
the replication in nature of a plea to the answry.

In this case, both parties are actors, i.e. pleffs - the own-
er of the cattle, suing for damages, & the owner in Eng.
for a return of the cattle, & in some cases damages.
4 Bac 373. 2 C. 100. 144. 6 ro. 8. 792.

Private Wrongs.

Replevin.

In law, both claims damages only - the cattle being here not returned. Bell. 61.

That arrengy is in nature of an action appears from arrengy right to recover judgment for return of the distressed in some cases damages. 4 Bac 373. Esp 376. 7. 2 Will. 117. Bell 95. 2 Bl. 117. may plead in abatement of the arrengy. 4 Bac 373. 3. Arrengy and mesne close with a verification. Cro. E. 5. 30. 7. 98. C. art. 1. 122. 4 Bac 373. Bell 103. Plow 2. 63. 4. 1. 14. 8.

But the arrengy is in nature of an action, one tenant in common, may it is said, arreng without his fellow tenant. Cro. E. 5. 30. 4 Bac 373. Esp 374. He must make cognizance as baillif of the other. Uponus 253. 2 H. Bl. 386. 14. 220. pl. 14.

Not only in common, may have several arrengies for rent, because it is in the realty. 2 H. Bl. 387. 14. 22. C. art. 540. Bell 379. 5. May 3. 4. 22.

The title to land may come in question in this action, it has been called (when this is the case) a real action. Now holds to be personal, as trespass or debt. Then land can not be recovered in it. 4 Bac 373. Finch 2316. Comr. 476. 472. 27.

In law if want of replevin, in case of cattle, damage lessant, is returned to justice, the damage exceeds his jurisdiction, he must dismiss the suit. I suppose. H. B. 5. 5. 100.

Under our Stat. if beastly taken damage lessant is impounded, escape, the damage & pounds are recoverable by action of debt, impound or making oath, that he took them damage lessant. Stat. C. 34. 6.

Now, what all distresses must be taken by day except in case of beasts, damage lessant, lest they should escape. 3 H. 11. Esp 368. 20. 2. 142. 161.

Private Property.

Professor:

Redress for damage, however, must be made while the beasts are on the land. C. p. 360. loc. 5. 142. q. 6022. - formerly with respect to distress for rent, &c., except that it might be taken in first suit. Now remedied by Stat. 3 B.C. 11.

As to distress for rent. Formerly the landlord might take as large a distress as he pleased. Tenant had no remedy. He now has by Stat. March 5 2 Wm. 3. a special action on the case. 3 B.C. 12. 3. 5. q. 43. 16 vol 104. It is 351. It is perhaps not maintainable if it be over £90. in the case, it being now fixed at £5. except where gold or silver, (being of a certain known value,) were distrained. 1 Wm. 3. 90. in other cases a specific action on the case, founded on the Stat. is often proper remedy.

Distress for rent is incident of power or right (accord-
ing to C. L.) to those cases only in which the debtor, owner
of the rent, has the possession, not when he has no
future interest, as in case of rent charge, as when, own-
er of the land conveys his whole interest reserving a rent.
2d. 8. 218. 215. loc. 2 id 142. 3. C. p. 355. 6. 213842. But he may have
the right, by clause of distress at C. L.

Now the right of distraining is by Stat 4 Geo. 2. Exten-
ded to all rents. 2 B.C. 43. 3. 2d. 6. 2d. 355. 6.

In case of distress for rent, by Stat 17 Geo. 2. If the defe-
ndant is unable to pay, he recovers his costs, less what in dam-
ages as is equal to the value of the distress, if that is less than the
rent due, but if the distress is equal to, or more than the rent due,
he recovers in damages the amount of the rent; & in the first case
distressor, may have a further distress. 3. 138. 150. 1 Bulle 8. 35. 16.
349. 2 H. 138. 36. 150. 8. 37. 200. 16. 116.

Private Wrongs.

Replevin.

III. In case of personal property attached.

Replevin in this case is never an adversary suit - no hearing on the replevin writ, but on the attachment. 2 Sw. 93. Kirby. It is called a "mandatory precept" requiring the offender to deliver the goods. 2 Kirby 276.

By this writ, property is restored to the owner on his finding security to prosecute, & to answer "such damages, demands & costs" as the "adverse party shall recover". Stat. C. 380. the security to prosecute the replevin, is, in this case, mere matter of form.

This rule founded on good policy that the owner need not be dispossessed of his property for a long time, & as attaching is but for security, he suffers no injury - security sufficient.

The object being to regain the property, practice is to charge no wrong, nor damages - no pretence that the taking is illegal. 2 Sw. 93.

Decided by S.C. that a replevin of goods attached, shd. be directed to the officer who attaches them, requiring him to redeliver, (ut supra) to give notice to plaintiff attachment & to return the writ. Kirby 276.

Replevin returned to the Ct., in which the original action is. Kirby 276. The bond is the pl'edge, to secure the original pff. & is preserved in Ct. or file for his benefit. Bond taken, is also bonds to prosecute (now are) to adverse party, date in replevin. 2 Sw. 93. Stat. C. 28.

Replying in some measure superseded by reception. Magistrate taking the bonds acts ministerially, he is liable if bonds insufficient, but not if the bondsman is responsible at the time, & the action may be brought against him.

Private Property

McClellan.

The no previous suit has been b't ag^t the pledges. Vol. 63.

It becomes surely in this case for the whole debt
Recd, as in Eng. Itself does, even over the amount of
the bond taken as the case may be. (vid 8 of 16. 28. 176. 13C. 76.
Coop. 71. 12. 16. 13C. 04. 76. 28. 12. 176. 13C. 36.)
Case in 2d. 102 strong
in Char a similar case here, Bond in Eng being for return
of the Goods. 83. 0348. Domp. 236. 4. 16. 4. 38. Co. 2. 16. 13C. 047. The action
is case 16. 102. 4. 7. 60.

Now my doubt, whether the action in this. Bonds
in Eng. doubles the value of the goods. 8. 0348. 60. 2. 16. 13C. 36.

It has been a Ques. in Com. whether p^rp's bond might
be taken by the magistrate. Decided in the Ct. of Errors that
it cannot, at least that magistrate is liable on p^rp's
failure, tho' responsible when the bond was taken. Note 105.
Suppose p^rp does not fail, is he just as liable in 1st instance?

It has also been questioned, whether when prop^r. to some
amount is attached or plied, the bondsman is liable for
more than the value of the property. No decision. Mr. R's opin -
ion aside from the words of the Stat. But the words of the
Stat. are explicit. An analogy to case of receipt^r man, who
is always liable for the whole unless he delivers the property.
Provided contra. vid. 4 T. R. 433. 2. 16. 13C. 047. Esp. 048. 2. 16. 13C. 036. 1. Con.

From analogy to the case of bail for loads of indemnity it
clearly appears the bondsman w^t. be liable only to the am^t
of the property attached. The analogy of the liability of a
receipt^r man, is also a support to the opinion that the bonds -
man w^t. be liable only to the am^t of the property attached.
But still the words of the Stat. are so express, that it is proba -
bly our C^t. would make him liable to the whole damages!

Private Wrongs. 3

Kiplooox.

Questioned also whether bondsman can discharge him
out by surrendering the goods, after judg^t. for debt in respect
to? This Ques. depends in some measure (i.e. so far as it is af-
fected by the entire of his liability) upon the former - how far
he is liable - more like the case of a receipt^r, man^r - he is bound
only to deliver. Not like bondsman in English law, who
engages only for the return of the property. - (I suppose he is
in Con. he can not?)

If the property of one, is attached for the debt of another,
replevin does not lie, but trust does. The replevin
in this case is not an adversary suit, & no one can replev-
in unless he is a party to the suit, & has a property in the goods.
Kirby 276. 286. 93.

So, it seems, replevin is not the proper remedy for a merely
distressing act, according to the English law, & being grounded
upon a distress. Bul. 53. Co. L. 145. Esp. 346. 350. 13. 146. 7. 2. 26. 89. 26. 13. 52.

If cattle of a joint sole are distrained, the married
husband alone may replevy, for property becomes husband's
by intermarriage. Esp. 375. 18. 2. 13. 53. But if wife joins
it is good after verdict, for presumption will be that they
were joint tenants.

Executor may replevy distress taken from testator?
Esp. 375. 18. 2. 13. 53.

If the goods of several are distrained, they cannot join
in replevin, the executors being debtors. Co. L. 148.
Esp. 379. 18. 53.

Goods distrained in a Foreign Country, the bonds
there cannot be applied here. Esp. 370. W^t Howst. 16.
cautions might be levied there.

Private Wrongs.

Slavery.

Wife has a right to things personal only - not of duds
of house 145. 372. 416. - 385. 16. 375. 68. Wife has a founded
right in the right of I suppose, a property in the husband.
Therefore it is a good plea in abatement, or in bar chas.
the "husband" is in a stranger. Esp 351. 2. 4 Bac 373. 2 L. v.
92. 1. 243. Gal 64. Different from actions of
trespass. Bull. 53. A mere title "proprietor," is sufficient,
for in supposing the wife is in possession, till dispossessed
by supposition itself.

Private Wrongs.

Action of Trespass on the Case. by Gould,

Action of Trespass on the Case arising ex delicto for injuries
to the Person and Personal Property.

This Action lies for wrongs not accompanied with force,
as acts which tho' not forcible are injurious - and except
neglect & omissions. Bull 74, for consequences in-
jurious occasions by acts, which are forcible. E.g. of first
kind of wrongs. Robber, Malicious Prosecution, Blasphemous
Mala Praxis. 2^d. Neglect in a Bailee Servant. Officer &
c. g. of the third kind - injuries remedied by actions usually
called, Trespass per quod &c. 3 Bl. 122. 3. Esp. 598. 11. Nos. 180.
S. Ray. 1349. 1402. 2 Bl. 1282. 3 Bl. 153. 4. 208. 9. Esp. 545. 2 Bl. 167.

Throwing a Log into y^e road over which one falls &
digging a pit. Stra 636.

Actions of Trespass on the Case are generally founded
on the Equity of the Plaintiff Westminster 2^d. Recd. 16. C. L. 29.
243. 3 Bl. 51. 21. Case was known at C. L. semb. 3 Bl. 123.
2 d. 16. 129. 2 Bl. 445. 2 L. 20. If Judge Kieve says Trespass on the
Case was unknown before y^e Stat. West. w^t some other title, at f.

In Con. the forms of declaring & common parlance
makes a distinction between actions on the Case, actions of
Trespass on the Case. e.g. Affumpst we call an action on the
Case; trespass on the Case. First class arising
by contract, the second ex delicto. English Law knows
no such distinction. Affumpst is trespass on the case.
3 Kieve. H. C. L. 245. &c. 394th. 3 Bl. C. L. 208.

(1)

Private Wrongs.

Trespass on the Case.

If the case is hot where trespass is the proper action - judgment arrest. 6 T.R. 125. 2 All. 131. 6a & C. 141. and 96. Reasons 5 Bac 191. 3. 4 H. 11. & 16. 506. and 2 Conways.

Where there is no force in the transaction - no difficulty - case always.

Where the original act - looking, an injury is with force, trespass will amount lies, in some cases. In others trespass on the case. Rule. If the act is immediately injurious, trespass becomes the proper remedy - as battery or one's self - false imprisonment - destroying property with actual force. But, if the injury is consequential, trespass on the case seems to be the proper action. To throwing a log into the highway over which one falls so - loss of service from a battery of one's Servants. Chit 8 to 3 Bl. C. 208. 9. 5 & R. 125. 123. 153. 4. 5 & R. 648. 2 Bl. R. 1055. 1 Com. 209. 3 Recd. H. 8. L. 244. 2 Wil. 313. Bull. 26. 74. 2 D. May. 1099. Starb 634. 2. Four 1114. 2. 7 R. 231. 5. May 2407. 2 Bl. R. 892. In last case the action is usually called trespass - & trespass hidden to be the proper action. 2 & 8 M. 16. 176.

Difficulty in applying the rule - the effect need not be instantaneous to sustain trespass. When it is instantaneous, trespass only is the proper remedy.

Injuries which are not the instantaneous effect of the original force, are in some cases remedied by trespass, in others by case. When the immediate cause of injury is but a continuation of the original force, it not being in any measure produced by the voluntary intervention of any natural agent, the author of the original force is liable on trespass. But in this case, he is the author of the whole force. the ultimate violence is his. The injury is considered

Private Wrongs.

Trespass on the House

considered in Law as the immediate effect of the original force. But when the original force ceases, before the party commences (as is always the case where of injury is produced by the voluntary intervention of natural agents, & in many other instances,) the author of the original force is liable (when liable at all) in case only. For here the ultimate force is not his act. The injury is not considered in Law as the immediate effect of the original force. (E.g. 1st A ball shot by C. hits Mr. B. who kicks a football, B. kicks it against C.) E.g. one shoots a bullet which after glancing 100 times hurts A's Servant. The bodily hurt is in Law, the immediate effect of the original force. For the proximate cause, or ultimate force is but a continuance of the original force, or causal causes. But art. therefore has trespass. As injury is not the immediate effect of the original force. (It is not in Law the purely physical effect, immediate or remote of the original force.) The immediate cause of the injury to A. is the causal cause, the physical hurt done to the Servant. His proper remedy therefore is Caso. And actions by Masters in such cases always have been substantially, as on principle they ought to be, case. (2 J. R. 167. 8. Esp 645. Sul. 9. 86.) tho they have been called trespass. L. May 274. 831. 3 with 18. 2 J. R. 167. 2. Nov 10. 446. 7. 3 East 599. 2 K. Rep 476. that the Master's remedy is Trespass.

A throws a stone, which bounds once & in bounding hurts B. Then the vis impinguia continues without intermediate natural agent, & Mr. has trespass. So if it bounds 1000 times. So if A throws a log into the road, & in throwing

Private Wrongs.

Suspension Case.

St. Rul. no. 3 & T.R. 648. Stra. 636.

(Rule on the case of a football, (put by B.C. J.) caused by the remedy.) — A ball shot at a mark glances wounded trespass lies. So in the Squib case. So in turning out a Mad dog. Cutting thorns. Dropping trees. St. Rul. 467.

In these cases the injury is the immediate physical effect of the force, continued, & not aided by intervening of free agents. But if a Log is thrown into the road, & it falls over it. case lies. Not the effect of the original force continued. East. 446. Com. 209. Esp. 599. Cro. 10. &c. case of shot. Stra. 636.

1 Rul. 295. case for riding a. with horse. to which ran own plff. (Com. 208.) Here I conclude the Diffe was not considered as agent so far as related to the force. 2 Law 172. See 2 B.C. N. 899. 2 Com. N. 117. Difft's case, he driving negligently, ran with force against plff's horse. Case adjudged to lie. Not alledged as the act of Difft. See East 598. The Difflar did not describe y^e force, as the personal act of Difft. 80. R. 188.

If I dig a trench on my own land, & divert a water course from my neighbour, the injury is the physical effect of force. Yet case no trespass lies. Then the proximate cause is negligence, viz. failure of the steamer, ergo not a continuous of force. 2 Law 174. Esp. 638. Stra. 5. 638. 9.

If a Servant in performing Masters business commits a direct injury with force (East 100) negligently, is it not a p. or case the proper action of Master? 1 Rul. 472. 80. R. 125. 2 B.C. 442. Sal. 441. 3 & T.R. 649. — Case. Ichikah. Stra. 1083. 70. R. 279. Bus. 2093. 2 Com. N. 446. Difft. Ship ran over plff's boat with force by negligence of Difft's pilot — case of proper actions. Not the personal act of Difft. See title "Master & Servant" page .

Private Wrongs & Trespass on the Case,

If A wilfully runs his Wifel against B's, trespass.
if it runs against by negligence - case. Injury immediate
in both cases. It is A's act in the former case - not in
the latter. 8 S. 16, 188. Cases of mischief by one Dog &
post. 3 East 593. Negligently driving a carriage. One
horse against the driver; 2 East p. 6. 464

If the Servant does it wilfully without the master's
order, master is not liable. 1 East 106. 1 Barn 204.

In the case put, of lopping trees, cutting thorns, the force
is continuous. It is one conjoined act of force. Case of the Spout
alibi. The erecting the spout does not cause the trees
not conjoined. Then the force ended before the injury took
place. Cutting down a head of water &c is trespass. It is
like pouring water on the spout. one conjoined act of force.

Where also his son an injury occurring in consequence
an act with force, the original act may be held to have
been done so it arms the action in case. It is mere de-
scription, p. 6. 3 Barn 26. 2. 2. 244

Whether the original act was lawful or not - not the
question. 2 B.C. 892. 1.

Said that case not trespass lies where the act is not
only lawful. e.g. Spout case. Atta. 636 Not lawful. e.g. put. of
cutting trees &c 2 B.C. 899 - Meaning.

Trespass lies not where the wrong act is not against
the peace. 3 B.C. 154. 5 Com 582. 2. 1. 2. 55 b. l. 17.

This action lies for a great variety of misfeasances &
nonfeasances. 1 B.C. 44. 3 B.C. 52. 122. 1 Com 132. 2. 2. 4. Many of them
have distinct titles - trover or trespass. slender 15

Private Wrongs. - Trespass on the Case.

A mere neglect for which this action lies on y^e ground
of delictum, must be a neglect of duty, improba or re
quired by Law. Csp 59. [Eg. a finder of property is not
bound to keep it safely - if it spoils thro neglect he is not
liable. Dux. j. d. Ray. 917. Pow. C. 252. Co. E. 214.]

Thus for negligence in his office, a Staff. is liable. So are
other officers, & private persons, (Co. 206. 7. q. 110. &c. 93.) in many
cases. [It is loco a Staff. w^t to liable for not selling out
property taken by process. In Eng^t he may return that
they remain on his hands, pro diffectis emptionem. 2 100.
360. Cal. 323. 1 Bos. & Tul. 360.]

A person performing business for another, in the
line of his profession, & doing it carelessly or unskillfully, is
liable in this action. But if the business was out of his
profession, he is not liable for want of skill. unless in
case of a special engagement, then for negligence. he is.
S. Ray. 214. 2 100. 359. Csp 501. But in case of an under-
taking in Physic or Surgery, it seems, that unskilful persons
undertaking, make the practice of Physic to a common
profession. They are not liable, even for neglect, without
a special undertaking. (3 100. C. 12. n. 166. Est 601. Co. 168.)
folly of the Nation!.

It lies in general against any one, by whose act, or
culpable neglect, the health of another is impaired. Eg. he
lies loco a Seller of bad wine, which has injured anothers health.
So for exercising a noisome trade, producing the same effect.
Csp 601. 110. &c. 90. 95. 3 100. 122. 100. in 166. 170. 4 100. 52. West. 135. 3 100. 182.
Q. C. If he does not know it to be bad? 1 100. in 166. 110. &c. 90. 95. 3 100. 5.
3 100. 166. Implied warranty that provisions sold are good. 107. & 86. 110.

Peculiar Wrongs. I. Wrongs on the Case.

For mischief done in a way, as biting, is a delict
such mischief - owner liable. Having notice, &c. &c. without
such notice. Cro. L. 350. 16 Com 208. Judgment arrested if notice
is not alledged. Stat. 662. 7 Stat. 12. S. Com 90. Esp. 601. 2. 16 Com
owner's Stat. notice not necessary. Stat. 208.

For injury done by animals ~~of~~ ^{for} nature, as bears
&c. without notice (S. Ray² 666. 16 Com 208. Cro. L. 254. —
(S. Ray² 109. Can the injury be different as to the object from
what owner had notice of.) Stat. 12. 64 or 1264 Stat. 662. /
Sciinter not reasonable (1 Com 208. 4 Co 18. 1 Mol. 4. "Sciinter"
not being a direct allegation. (on the ground of negligence.
16 Com 208.

If A's timber flouts on B's property. B. has case & ^{for}
posse (2 H. 156. 256. Esp. 639.) He lies for a disturbance, i.e. he is
during one from the free enjoyment of his right of some
kind - generally an incorporeal right (3 H. 236. 241.
1 Com 194. 9 Co 112. 3. Env. 266. Cro. L. 845. 16 Com 275. 2 H. 186.
2 Mol. 104. 106. 109. 1 E.g. obstructing a right of way by di-
luting watercourses. Stat. 5. 638.

For an escape, either on mesne or final process.
This action lies no. v. y. Shff. t. c. (2 Bac 245. 16 Show. 176. now
by Stat. Westminster 2² & 1 Rich. 2² Doubt lies v. t. him for
escape under final process. But case still lies v. both
instances. As to law, the only action v. Shff. in either cas-
was trespass on the case. 2 Bac 245. 16 Show 176. Esp. 609 Co.
2. 17. 2 Shff. 873. when debt is lost, the party cannot give
less than the whole, i.e. 9. 2 H. 1048, Miller on Case. Esp. 609. 10. 25. 16. 17.
18. 19. 20.

When the process under which one is arrested is void, no action for replevin
lies v. Shff. S. Com 47 monies only. Esp. 608. 9. Stat. 275. Cro. L. 188. 576. Caith. 14. 8
Co. 562.

Private Wrongs; Trespass on the case.

The nonfeasance of under Shff. Shff. himself only is
able. Because Gen. his misfeasance shall not be under
Shff. liable. e.g. voluntary escape, embezzling a suit.
Ex. 503. Coro 8. 175. Gal 18. 8. Aug 40. Coro p 493. 2 Mod 32.

If a Shff. having arrested one on mere precept, refuse
to take sufficient bail, when tendered, he is liable in case,
but not in trespass. not a trespasser ab initio, the abuse
of the authority of Law being negligent. Cro C. 141. Oct 190. Stra 23.
No. 6. 11 Dec 20th. 2 Wm 313. 2 Mod 31. 8 Cor 146. 6. 1 Dec 189. 1 Cor 489.
5 Cor 582. 2 Rul 561. 2.

The action lies also at rescuer of one taken on mere
precept in favor of the original plff. (Bull 62. 6 Mod 11. 1906. 677.
76. 18. 183. trespass with arms) Jury may give the whole debt
or less. Expedient to prove the original D. sc. absolved,
or out of reach. Bull 62. Est 657.

So it lies for rescue of one taken by final process in
favor of original plff. Est 610. Coro 6. 77. or 109. Hult. 98. 5 Cor 438.
Proceeding to rescuer, did damages Shff. according to Est 610.
So in this case in favor of the Shff. Hult. 98. 418 ac 399.

He lies for Shff. vs. a person escaping either on mere
or final precept. Est 612. & that, tho the Shff himself has
not been sued. Est 613. Coro 8. 53. So vs. the under Shff in favor
of the Shff. acmt 6. (Ex. 513) but not in favor of the party until
the escape be voluntary, se prae. Coro 8.

But the under officer cannot maintain the action. vs.
the party escaping over who the Shff. has recovered
it to him for under officer, for he is not liable to the Shff. by
law but by contract. Ex. 613 Coro 349. The injury is to Shff.
only, not to the under Shff. See in Coro 8. 9

Private Wrongs; Trespass on the Case.

Attorneys liable to this action for neglect, or miscond
uct, injuring their Clients. Esp. 617. 2 Wils. 323. 3 Barb. 2060. Sat. 86.

Attorneys are sometimes liable too, to the adverse par
ty, for dishonest practices. Esp. 618. E.g. an Attorney knowably
took judgment against a wife, after the marriage, if it had been
non proposita. State L. as case at the Albany Court, 125. 3 Barb. 377.
3 Bl. 165. 1 Mod. 209.

It lies not, Justice of peace, for refusing to do their du
ty, e.g. denying bail, refusing to authentic instruments
only, which require his signature, as with depositions &c.
Esp. 618. 1 Barb. 323. 1 Hough. 96. 1 Neal. 97.

It lies not, but a person who has sued out a writ, for
not countersigning it on gallment, unless malice is proved.
1 Barb. 388. 2 Wils. 302. who legal duty.

It lies for breach of trust in Bailees. Esp. 618. 2 D. May.
709. (See tillis trover & bailment.)

This action lies, on the ground of negligence, in all cases
of Bailment, when the property is injured by the want of that
degree of care, which according to the nature of the business
the bailee requires (in which is expressly stipulated for).
1600. 208. 209. 60 Sic. 89. 4 Co. 83. Sat. 76. Com. R. 133. 2 D. May. 900.
See Tillis Bailment Esp. 618.

It lies not, masters or master of vessel, for goods lost,
or injured thro' negligence. Esp. 623. Sat. 440.

But the owners of said, it is said, must all be joined,
as the right of actions is general & contracted. 3 Barb. 203.
5 D. M. 681. Com. R. that the case in gen. was treated as an action
on contract. But if one is sued alone, he must plead it
in abatement. Esp. 623. 5 Barb. 2611. 3 Barb. 203. 440. Com.

Hurable Wrongs. Trespass on the Case.

Post masters not liable for letting loose, or notes on them
lost, thro' the fault of subordinate officers. Esp. 624. See p. Comp.
724. The officer is less intelligent, not incurious & less
of responsibility if any misconduct reherses it to him. by p. 625.

But for actual fault of his own, Post master is li-
able. So are the Warden Officers. Comp. 765. arg. Section 3. Vol. 443.

Innkeeper liable for all property of their guests lost
for want of that degree of care which the law requires of
them. 3 Wm & 2 Ch. 174. Psalm 314. 2 Rot. 325. Rule 73. 86032. Com. 216.
632. 626. 3 Blc. 165. 6. Dyer 466. 7 Mo. 178. Jones 2. Bail. 135. c. 80. lia-
ble for Goods stolen by Guests Servant or companion, or
taken by publice enemies. See Bailment.

No subject innkeeper for goods stolen by plfmeutham
been a Traveller, & a just tresser as a guest. Esp. 626.
5 R. R. 273. c. 10. 76. At night, procuring lodging is not
a guest within this rule. 86032. Esp. 626.

Innkeeper not chargeable as such except he receives
profit from the guest on his goods. Esp. 627. Ego if the
guest goes away steals his goods, he is not liable. C. 10. 8.
168. q. & like if he leaves his horse, for this is a profit
the owner is absent. Esp. 627. Sec. 388. Hilles in 16. 8. 1410.

So he is liable for dead goods, if the owners absence
is but temporary. & he is still a guest. E.g. going out in the
morning or business, returning before night. Esp. 627. Com. 189.

Innkeepers without horses, money or no 24 hours for the inn
keeper. esp. 628. C. 10. 8. 622.

Innkeepers not liable for injuries to the person of his
guest by third persons, as assault battery. See esp. 628. 86032.

Innkeepers liable for not receiving guests, unless

Private Meetings. Registration on the Books.

he has a good reason to refuse. So against a common carrier for refusing to carry. 3 Bl. 116. 160. 2 Inst. 327. 1 Inst. 344.
3 Bl. 180. 182. 1 Inst. 70. 9 Co. 87. 10 Inst. 158.

The action lies for deceit or false - as false warranty or false affirmation. (Esp. 629.) e.g. affirming rent to be more than it was. Sal. 211. warranting goods to be of such a value &c. 16 Com. 166. 7. 1 Kell. 40. 4 Inst. 629. 6 Inst. 4. But as to fraud in the sale of real estate. 2 Day 128. Codicet 384. note
1 Fondt. 366. 2 Caius R. 193. Cruise, cit. 38. C. 5. § 57.

It does not lie, vs. vendor, for false affirmation, when vendor has been guilty of neglect. As of vendor may be easily have learnt the true value &c. Esp. vendor affirming that A. B. would give 100 £. So if the defects are visible a general warranty extends not to them. Esp. 629. 630. 2 Ray? 1118.

1 Fondt. 110. Finch L. 289. 1 Sal 24.

Does not a special warranty subject in this case? Esp. 630. 1 Com. 170. 3 Bl. 165. General warranty of a horseholder good after vendor, that he had but one eye. Sal. 211.

So it lies for artfully disquising known defects. Esp. 632. 2 Inst. 18. 5.

So when vendor practices fraud by a false affirmation in respect of his title to the goods sold. Since in this case said to be misrepresentation, i.e. when fraud is the gist, so cause not favourable in pleading. 1 Bl. 30. For the Law side Esp. 632. 1 Com. 171. Atk. 182. 91. Barth. 40. 3 Inst. 12. 57. 1 Fondt. 109. 370. 6 Inst. 474. 10 Inst. 63. 68. 1 Sal. 210. 2 L. Ray? 593. 1 Bl. 30.

So it lies for injuries occasioned by any false statement made to defraud, the the person making it has no intention in the fraud. 3 Inst. 51. 1 Com. 167. So for injuries done

Private Wrongs, Suspension of the Case.

by creating or false, pretences, &c., also his personal injury.
2. L. 633, 660, 683. L. ac. 40, 1862 58. Bull. 52.

If it be a innocent act, made an innocent person liable over to a 3^d person, then liable to the owner. e.g. I have a cattle on to 133 land, & thus subject of the damages. I am liable to him for the same. N. B. Grand. Conn. 525. a. 6. 325; 1120: 100. March 3. 4. art 3. 2 Sec. 2 82.

Since a public right is obstructed or violated to the injury of an individual, he may maintain the action 25 p. 604. But he must state the special damages. e.g. Off. as an inhabitant of a certain place had a right to pass a Ferry, toll-free. - Ferryman refused to carry him. He took his action stating the common right, but not laying the special Dam^s action lay not. Sal 12. 560723. Court 143. So of a public nuisance, occasioning private damage.

So it lies for injury received from nuisance in general. e.g. obstructing ancient light. 9 Co. 58. 3 Bl. 216. 10 M. 239. But said that it must have stood times immemorial. Cope. 170. 600 t. 118. Sal 452. 600 116. Wilmet, I. h. 40 years sufficient. - perhaps 20. Cap. 636. "Presumption of agreement." 2 Sim. 175. note 17 Bos 1 Bul. 400.

If a man having built a house on his own land, sells it, neither he nor any person claim interest under him, may erect any building which will stop its light. It would be an injury in derogation of his own grant. 26 n. 26. 12. 122. 16 Conn. 214, 17 m. 2 37. 209. - the 1st. fine is not a court.

But obstructing a prospect is not actionable. mal
ter of pleasure. 3 Bl. 217. q 6058 16 630.

Private Writings of Webster in the House.

A house built near a street, is, on the street side immediately entitled to the privileges of an ancient town
burgh. Simb. Esp. 636. e.g. action lies for raising y^e block
so as to obstruct the windows. 3 Will. 4. 61. n. 150. W. 9. 24. Builder
not foolish or improvident in this case, as when he builds
by another land.

The recovery of damages for a nuisance is no bar to another. Esp. 637 loco &c. 191. 2 Leon 103. Every continuation of it, is a new wrong.

Do the author of a nuisance, does not discharge him self by leasing or assigning, from actions for injuries occurring after leasing to: Hal 460. Crook 373. Esp 637.

So too in the last case the action lies not against or
defect, when the continuance occasions a new misfortune. *Eg.*
537. *Brod. 373. 553. 10th f. 250.* See where the whole injury is
done by the first creation.

For obstructing lights, action lies back in favor of his
son for years, (rescissions) for it is an injury back to
the inheritance & present enjoyment. Esq 627. 4. 1711. 14.
Coro C. 32.5. or 2.37.

So this action lies for overhanging plgs' house, or
lens, so as to cast shadow upon it. 3 Bl. 216. F. & G. 161. 1 N. C. 107.
1 Com. 213 or 23. 2 N. C. 140. 5 Co. 101. Esp. 637. 1 S. C. 634. 1 Com. 213.
So for encroaching a shoul. sp. S. C. 634.

So far erecting a manufacture, &c. the vapour of
which injures all herbage &c. Esp 638. 1 Nov 89. Com 8. 19.
3108217. as a smelting house. So far infesting the air about
our house, in every way so as to render it uninhabitable. 637.
637. 46059. a 1 Com 2. 14. 2 Nov 89. 141.

Private Wrongs, / Treasures on the Water.

Injuries & torts persons, as standing in the relations
to others of husband, parent, or master, give him certain
actions the title of "Domestic Relations". Esp. 644, 645, 646.
Husband, Bull. 78. Brod. 501. 538. Parent, 1601. 18. 3 Bur. 1878.
2 D. R. 166. L. Ray? 1032. - Master & Servt 169. H. N. B. 340. 2 Bur. 68.
Comp. 64. 2 Bl. R. 387. 3 Bur. 1345.

The actions tort in these cases have been in form
but ~~as~~ as ~~it~~ it arrives, but they are substantially actions
on the Case. Esp. 645. 2 Bl. R. 167. Sal. 206. L. Ray? 1032.

For other personal injuries: If a legal voter, ~~tenders~~ a
vote, & the returning officer refuses to accept it, Cases
lies vs him. Esp. 647. Sal. 19. 3 Saltk 17. at C.L.) So a candidate
for an election office may have this action, vs y^e return-
ing officer, if the latter refuses to take or count his vote.
Esp. 646. 2 Bl. R. 205. 1 Bur. 206. 2 D. R. 50. 3 Bl. R. 6. 32.

So returning officer is liable to this action on favor of
the candidate, for making a false return of the votes, at
an election. Esp. 647. 11 Co. 99. These are rules of Com. Law.

But hold on that it lies not for a false return of a
member of Parliament, unless the right is determined
in Parliament in favor of plff., or cannot be determ-
ined as in case of dissolution. Sal. 502. 6. 1601. 45. 49. Parl.
1601. 127. Parl. esp. 647. Mo. 67. 10. 4. 275. These are rules of Co.
Law. That is this subject in Eng. giving double Dam.
7. 18. Will? 3. + costs.

So against an officer for making a false return to a
man outside it lies. Esp. 648. Bull. 62. 3 Bl. R. 111. Foot. 33. 1.

So at C.L. as without Stat. or y^e subject an author may main-
tain this action vs. one that uses his works without his permission.
4 Bur. 2303.

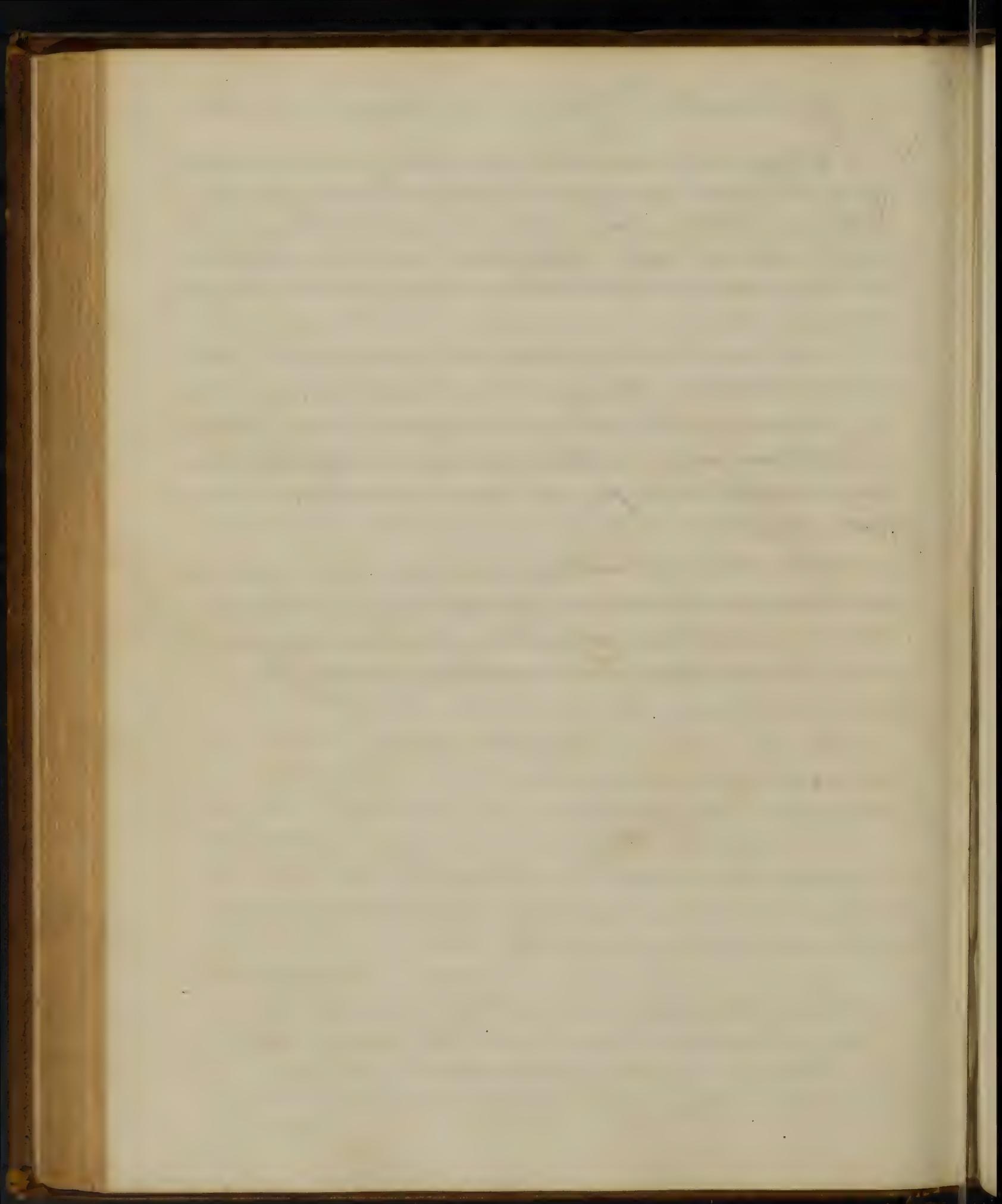
Private Wrongs.) ⁽²⁾ Respondeat Causa.

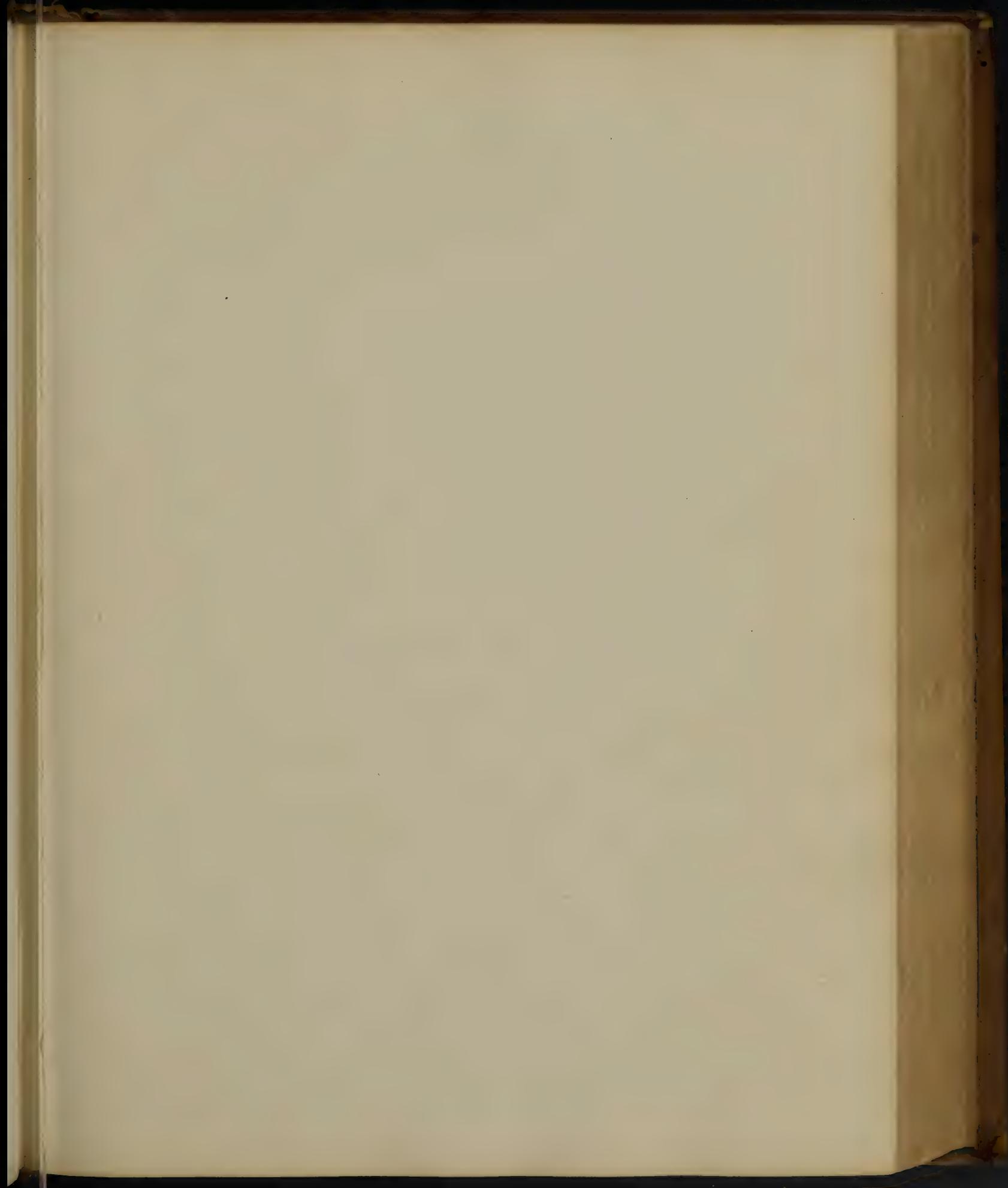
Any person employing another is answerable for his misconduct or neglect in doing the business, and is then liable in this action, i.e. when the injury is remediable by case - otherwise he is liable in trespass, or any action adapted to the injury. 1 Esp. 500. 2 Ray 729. 2d 441. 4 Stra. 1083.

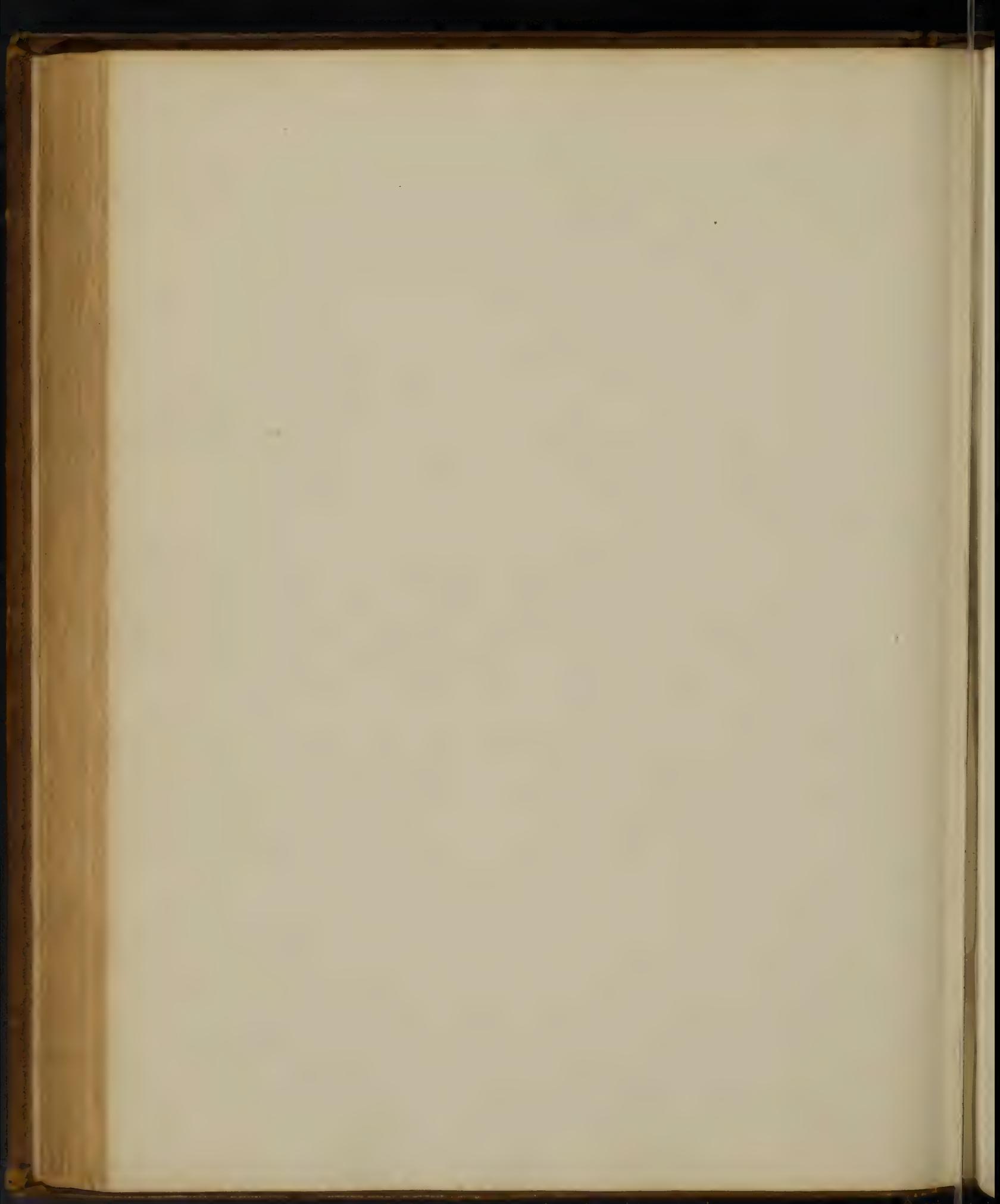
It lies for obstructing process. e.g.: if an officer is prevented by a stranger from executing a process, as by removing the goods of the original debtor, or locking up the original debtor's doors, case lies for the officer on the party in the process. Case in N.Y. City. See Cro. 498. 5 Co. 93^a.

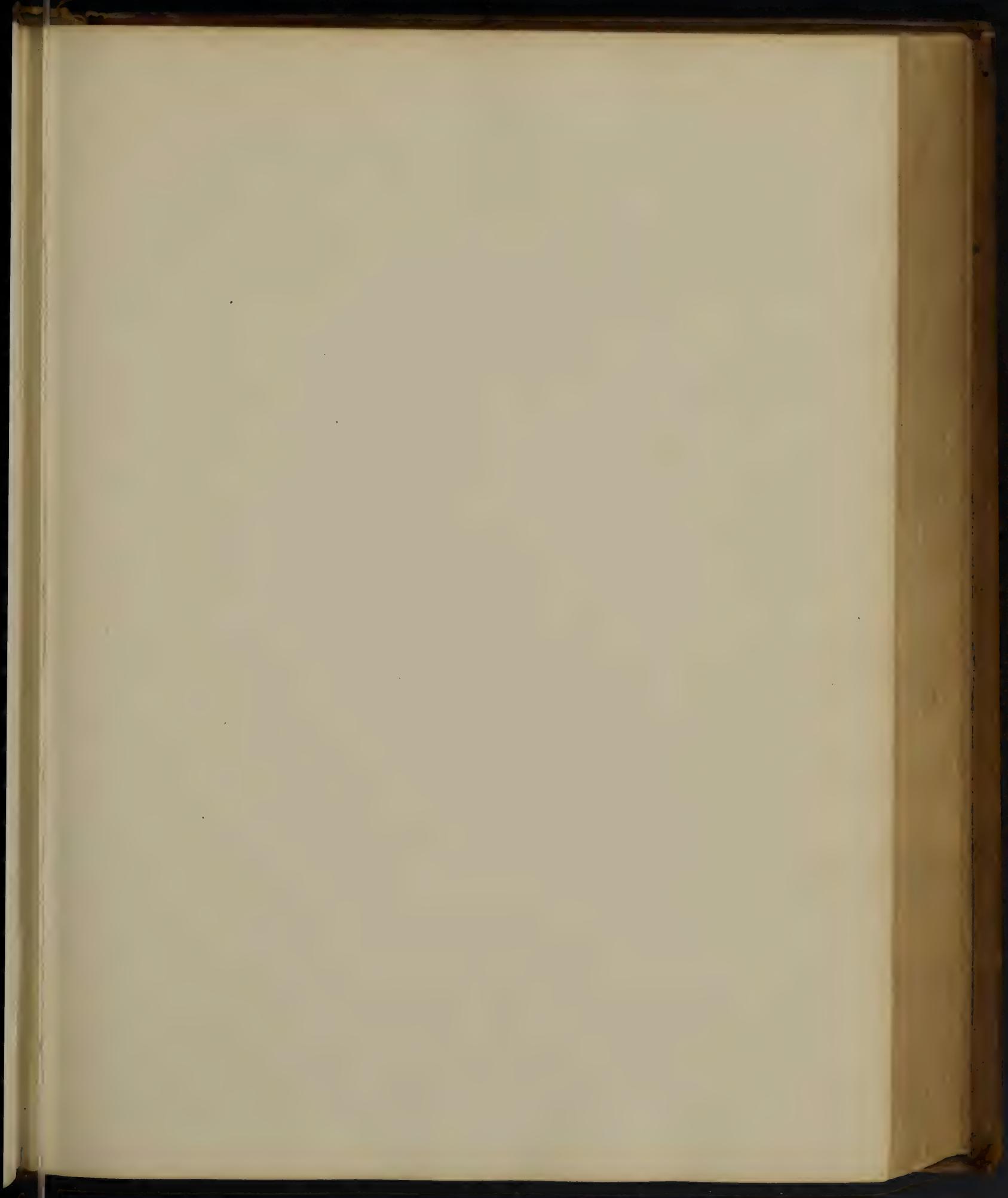
In declaring in Case no precise form of words necessary, as there are in specific actions.

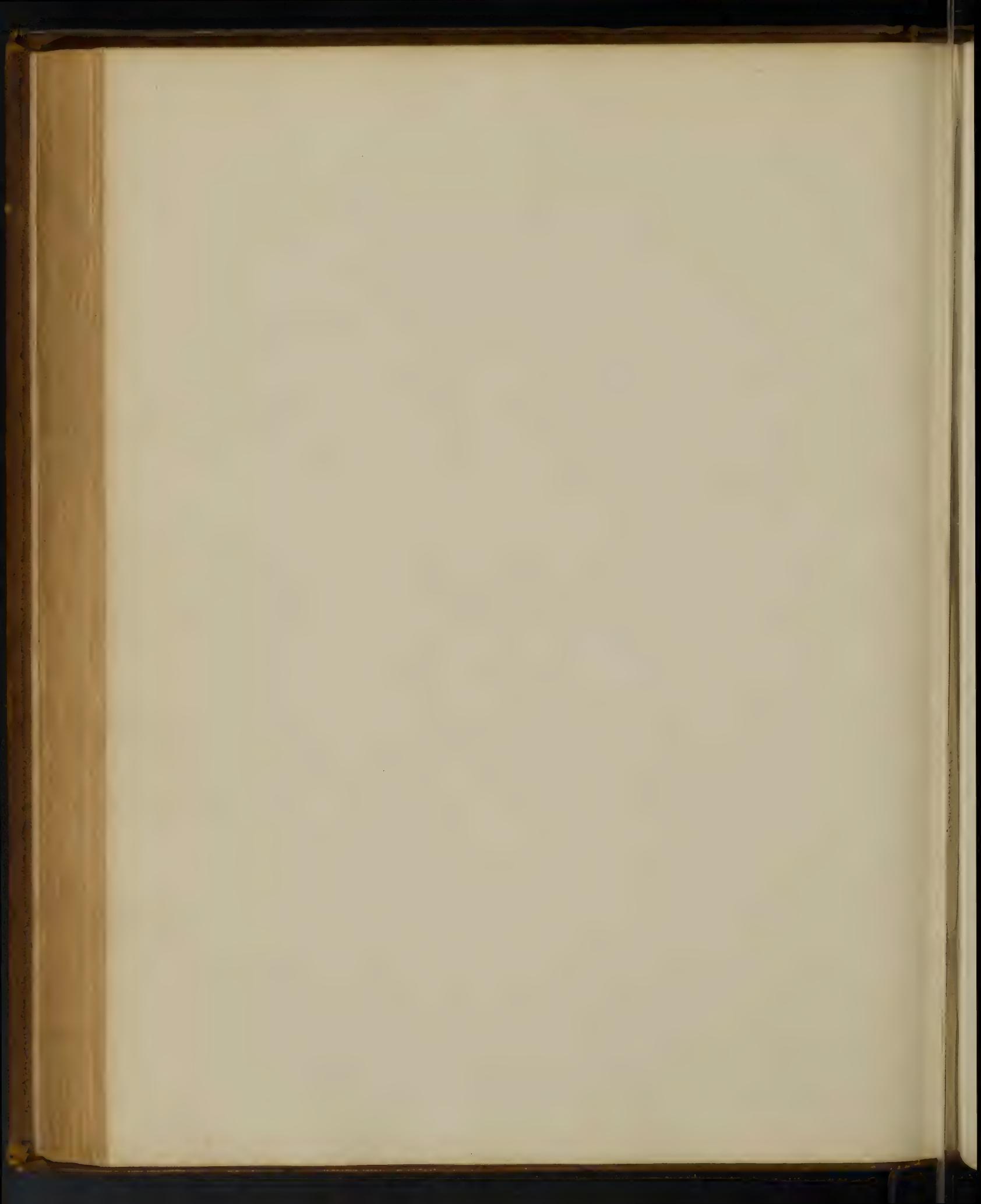
Tell. N.Y. 193. 10. N.Y. 541. argued. As to the actions per quod videlicet "Baron & Son", "Parent & Child". "Master & Servant".

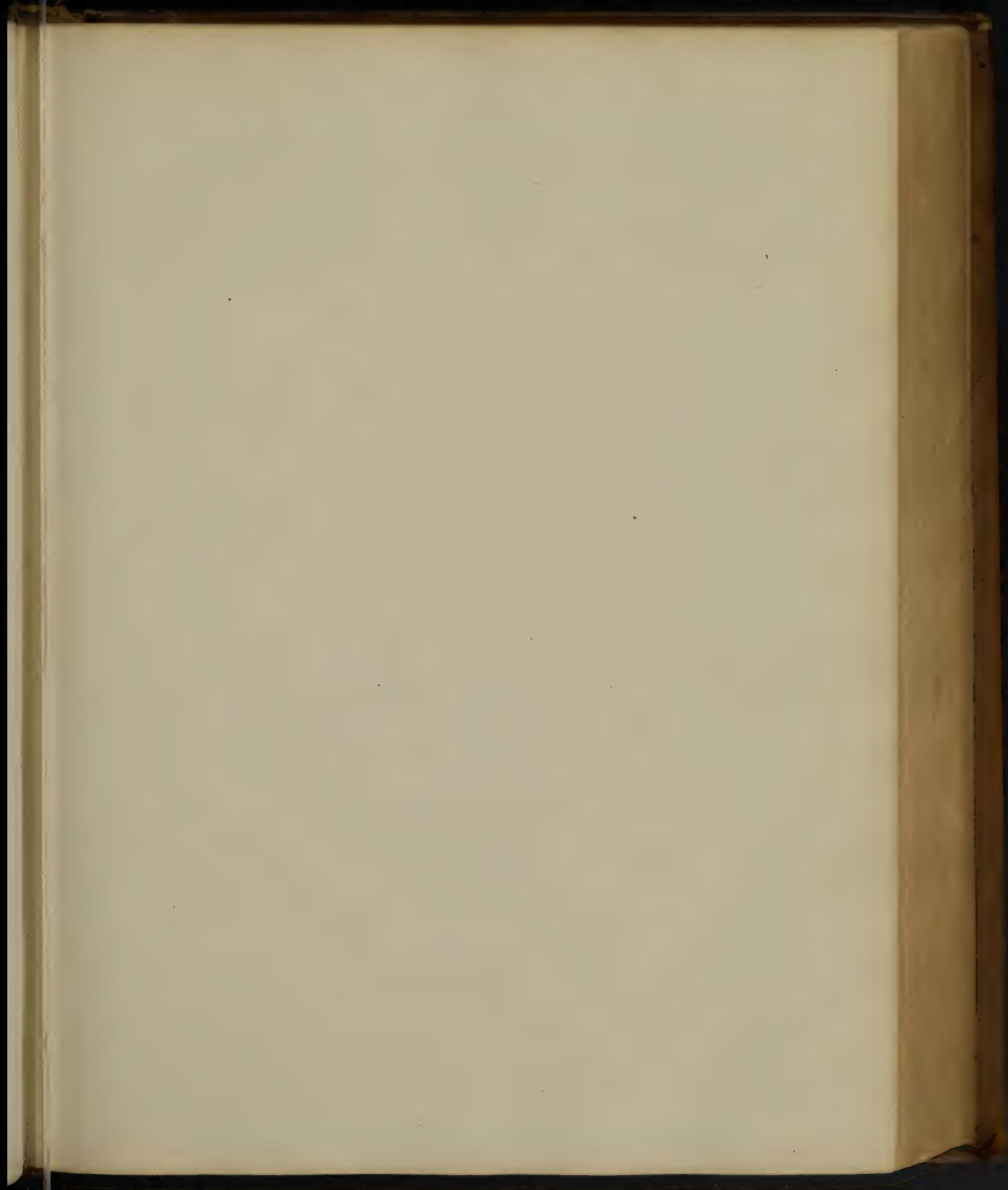


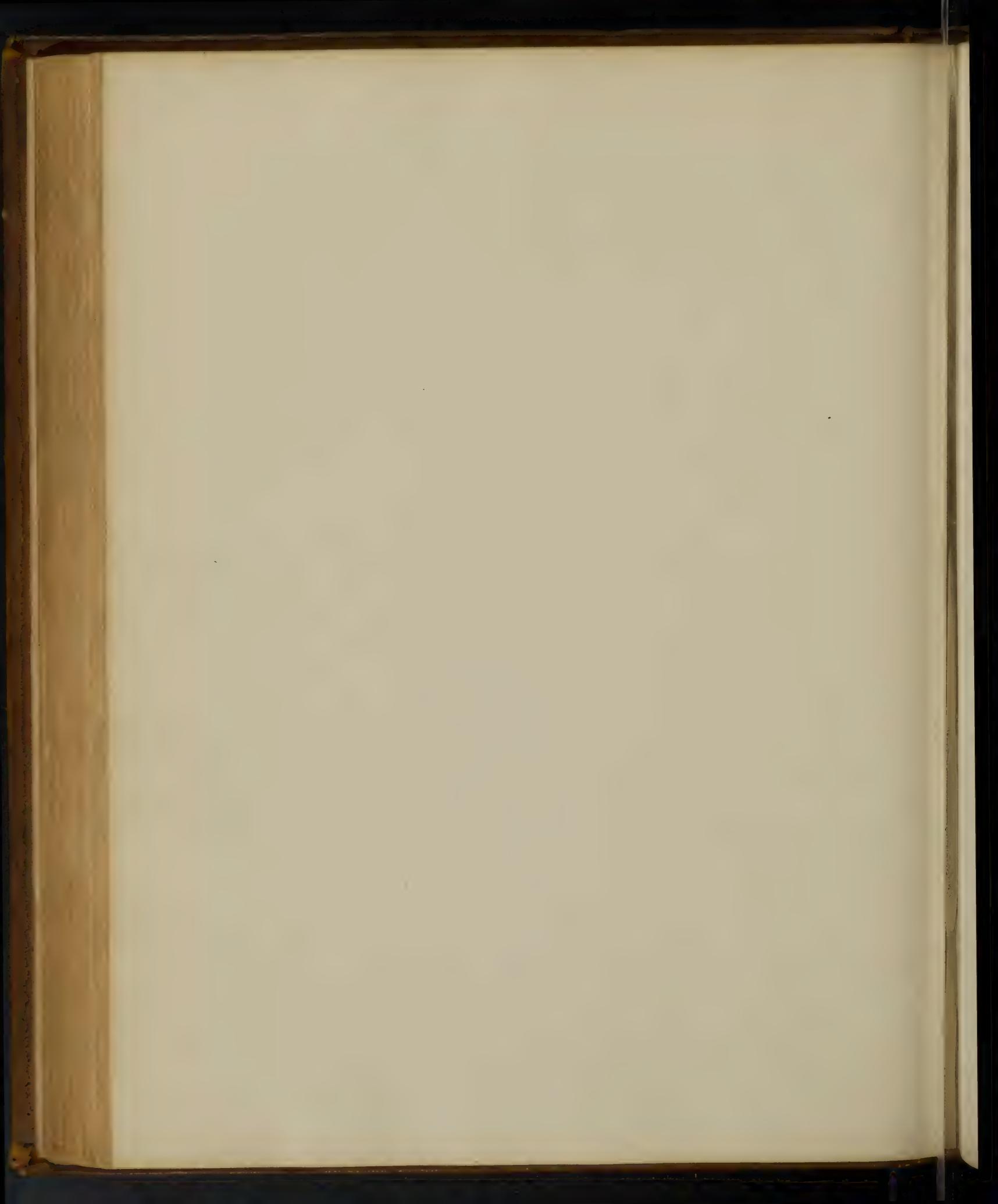


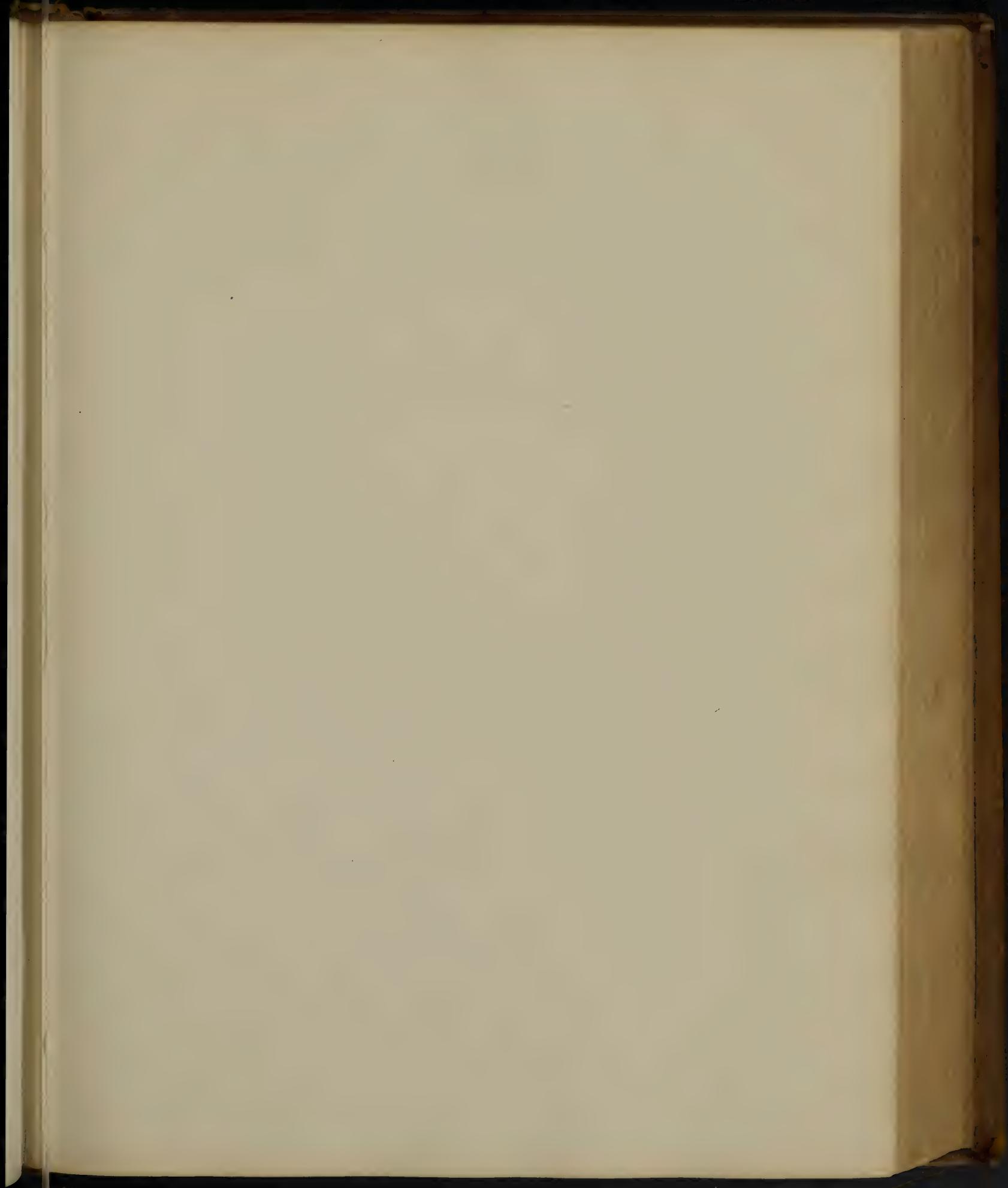


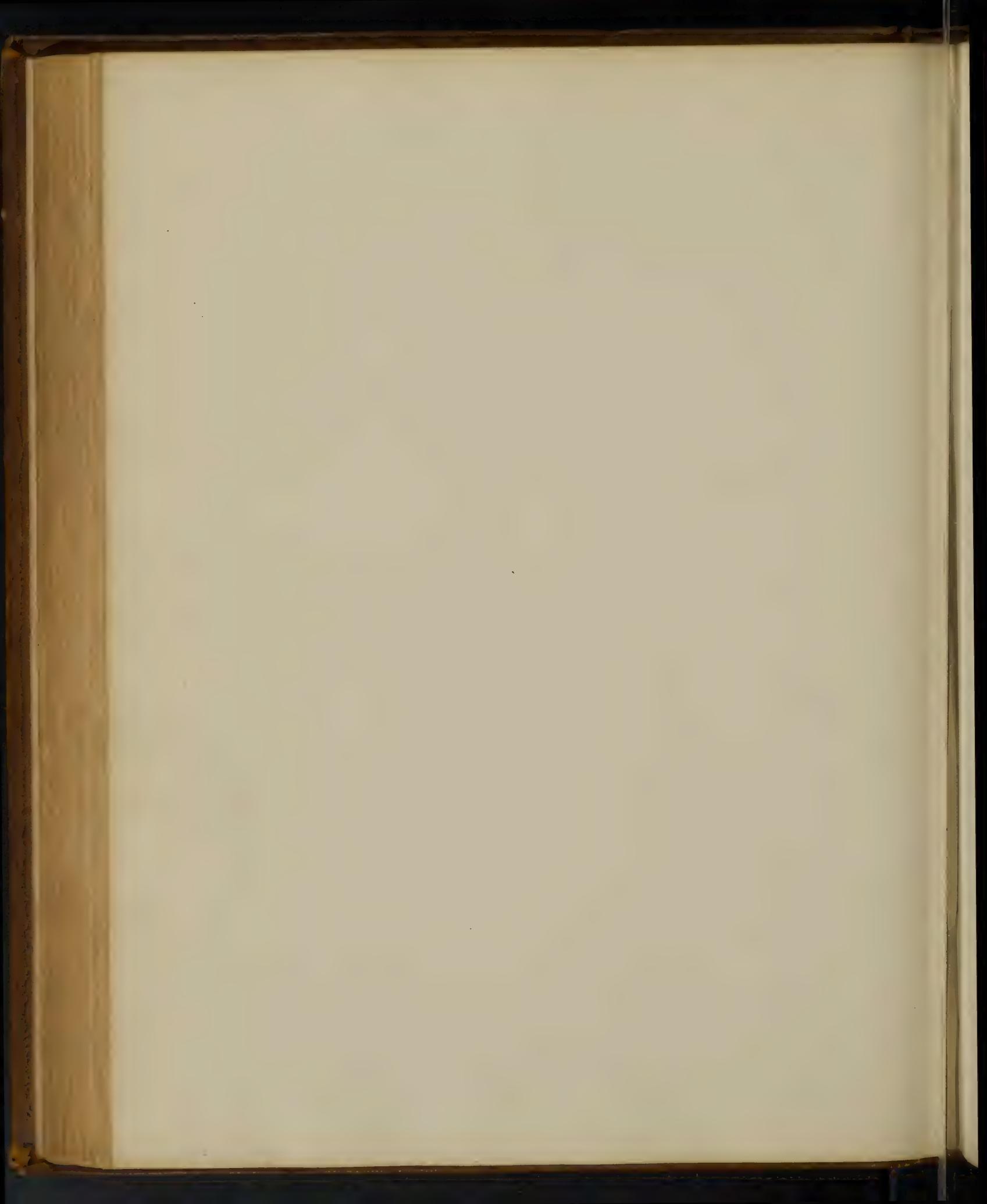


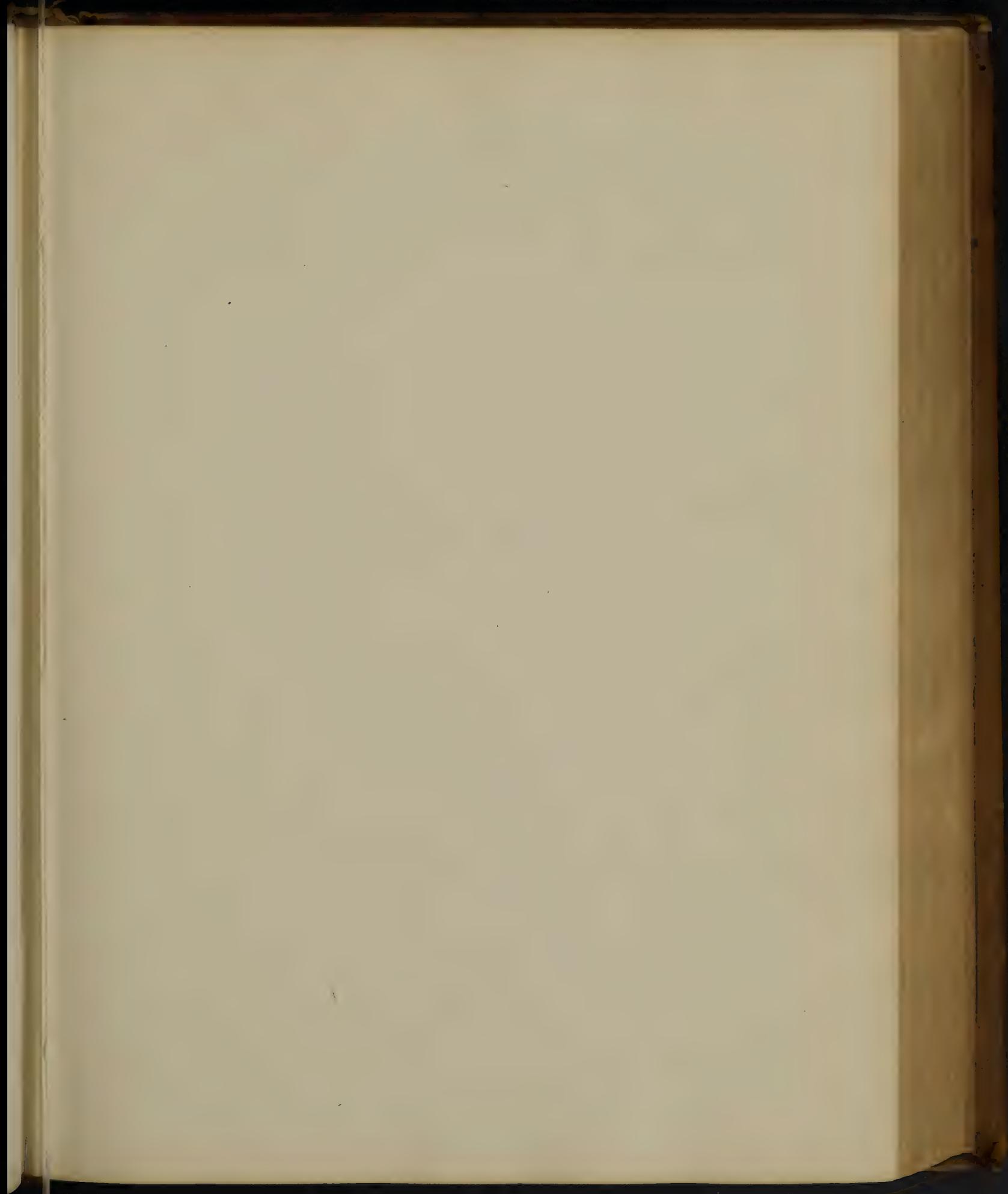


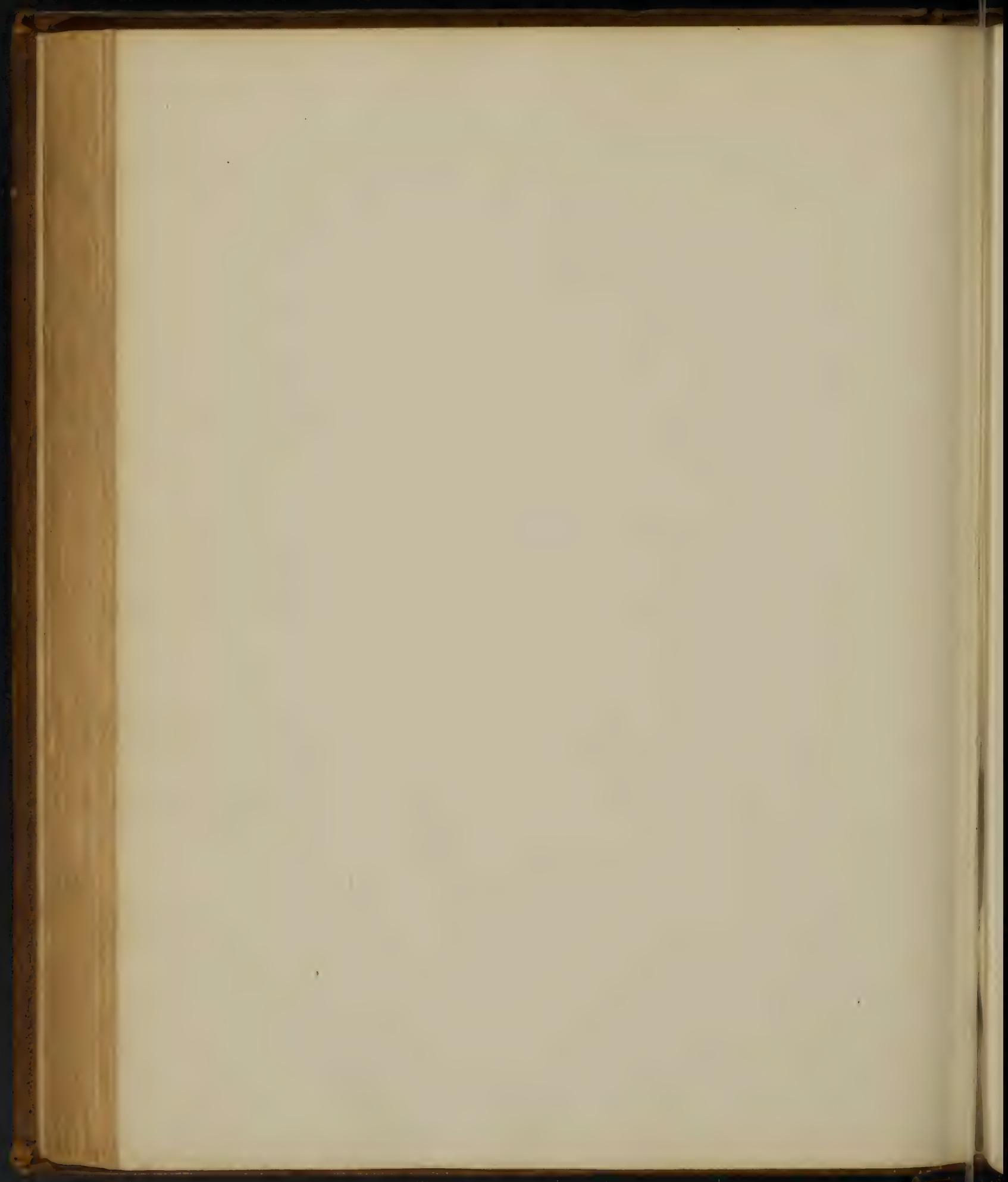


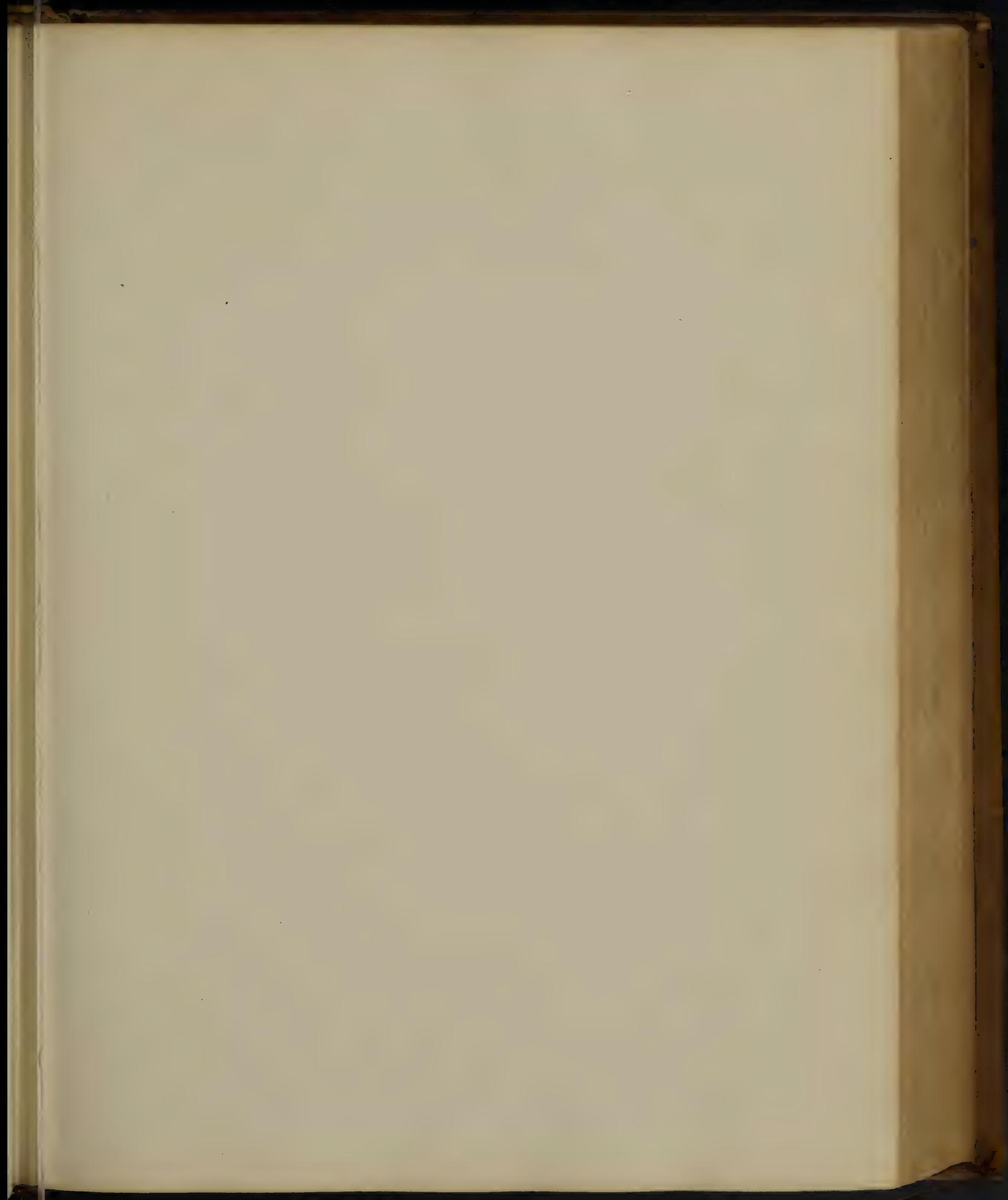


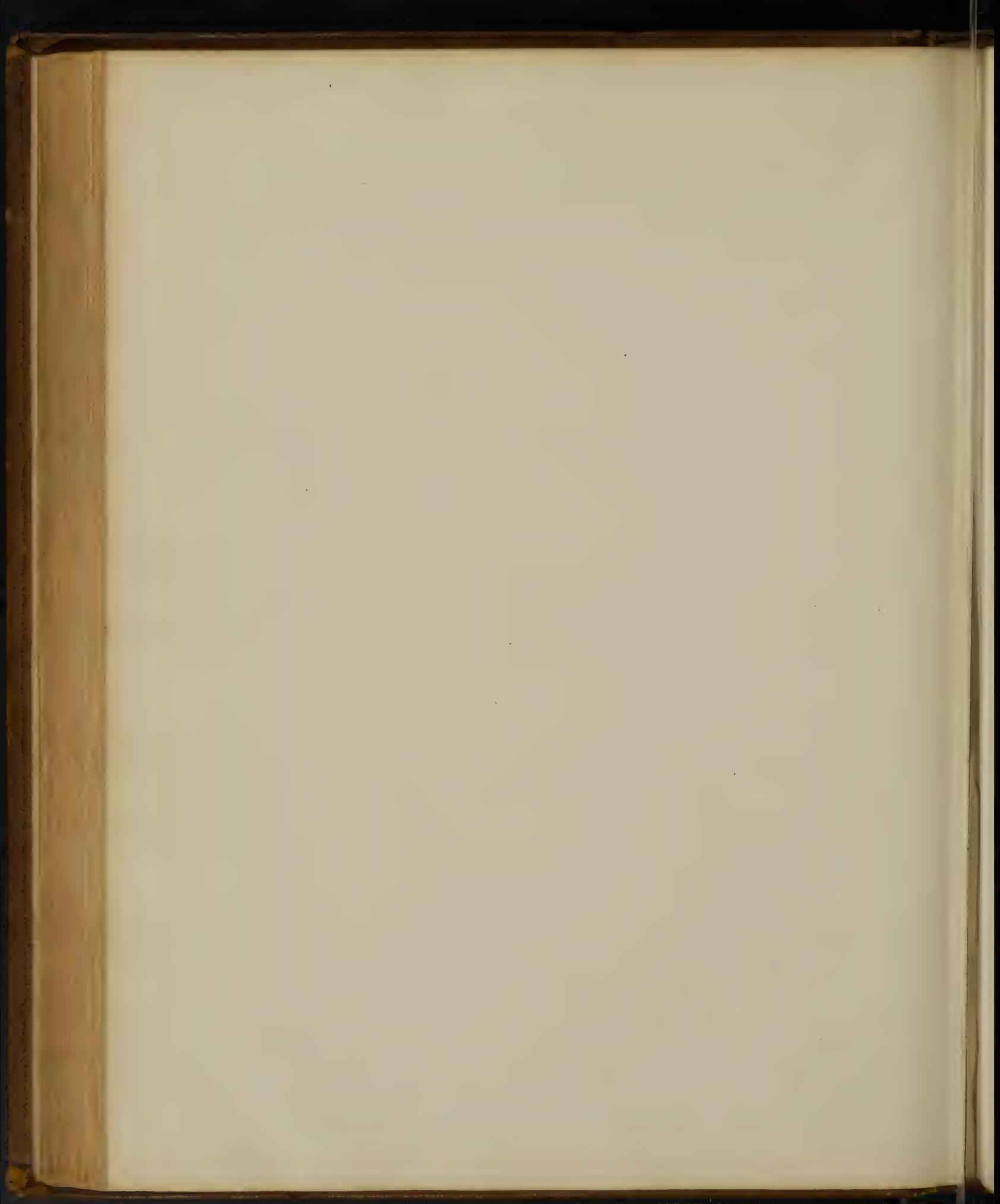


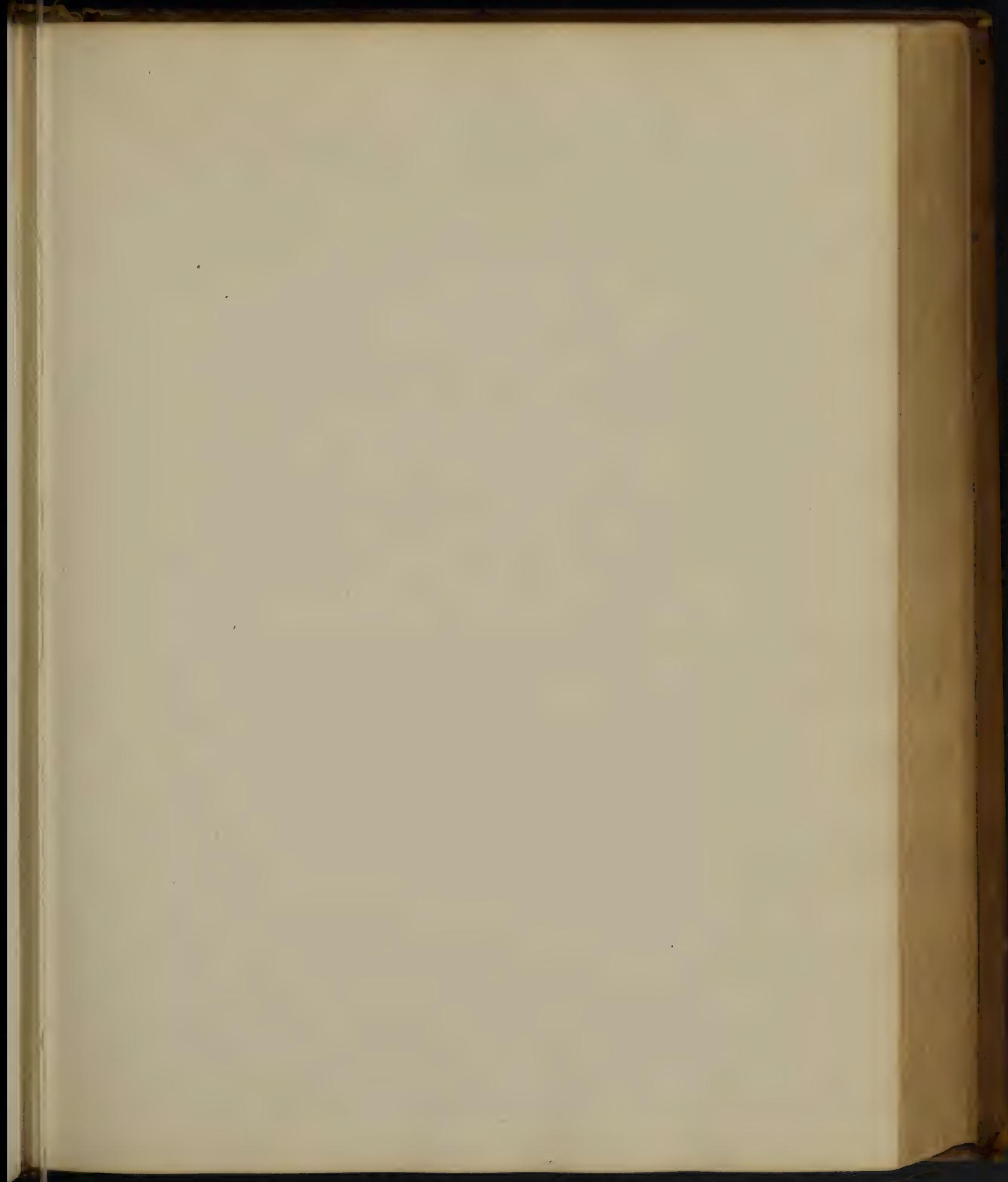


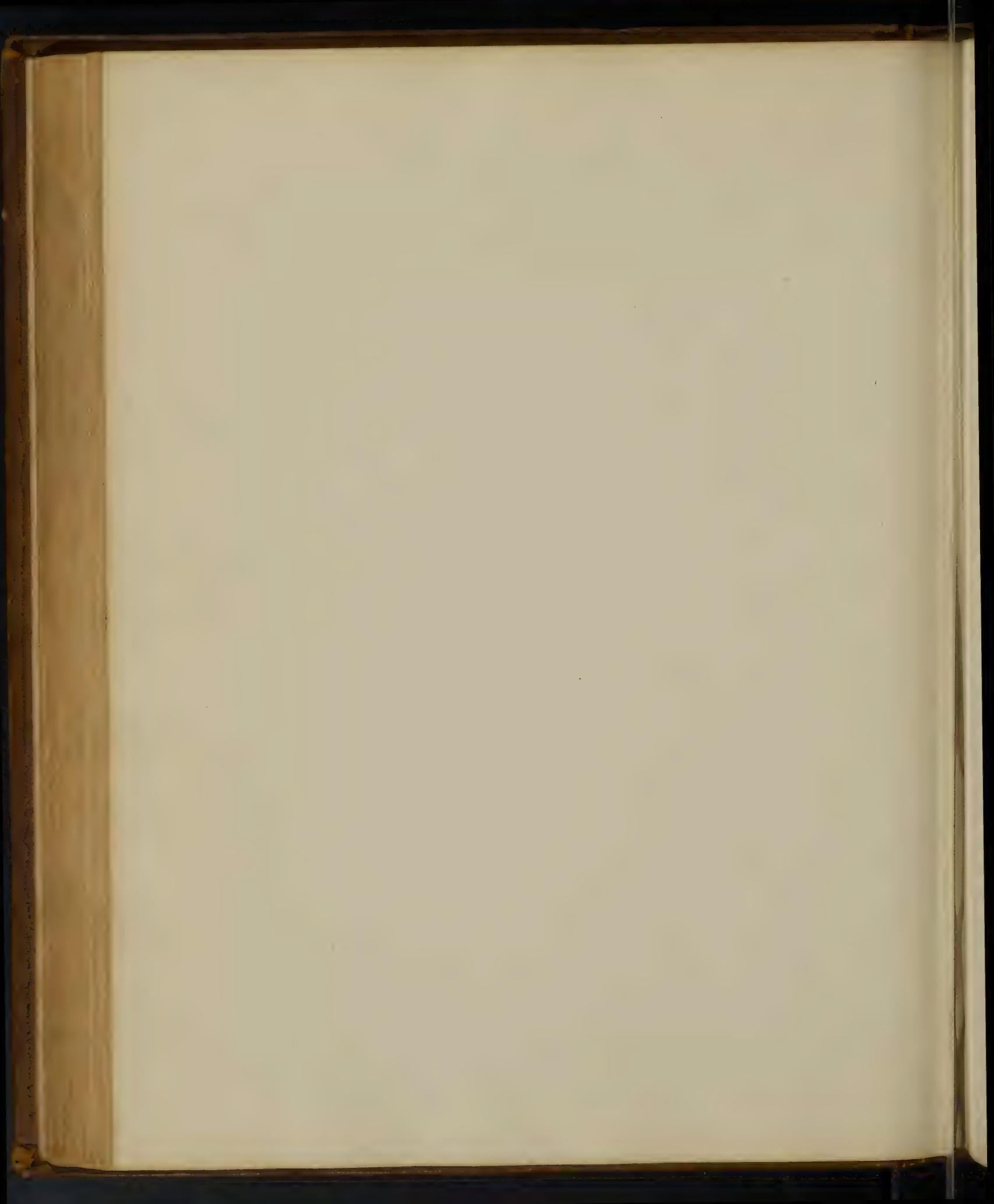


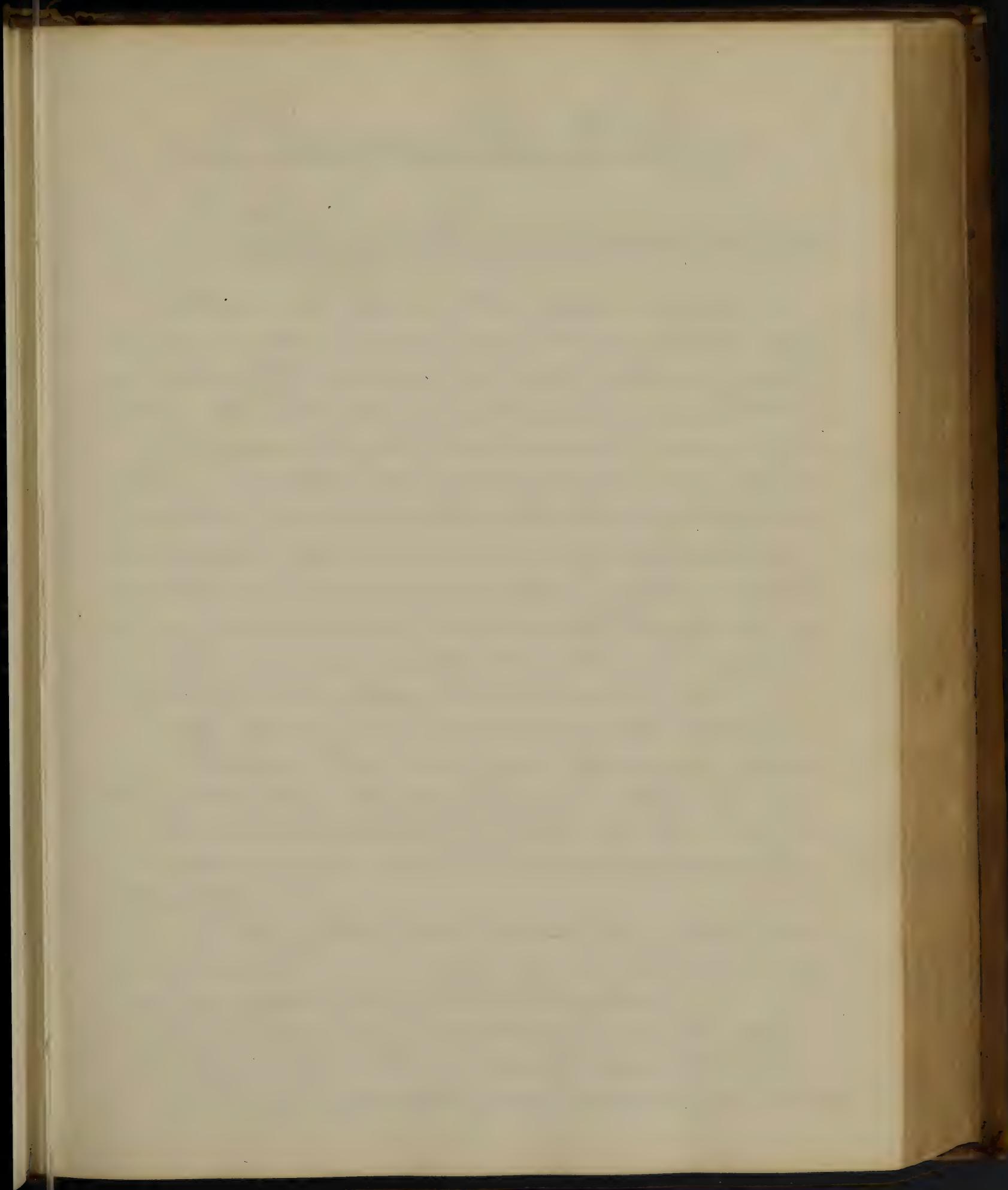


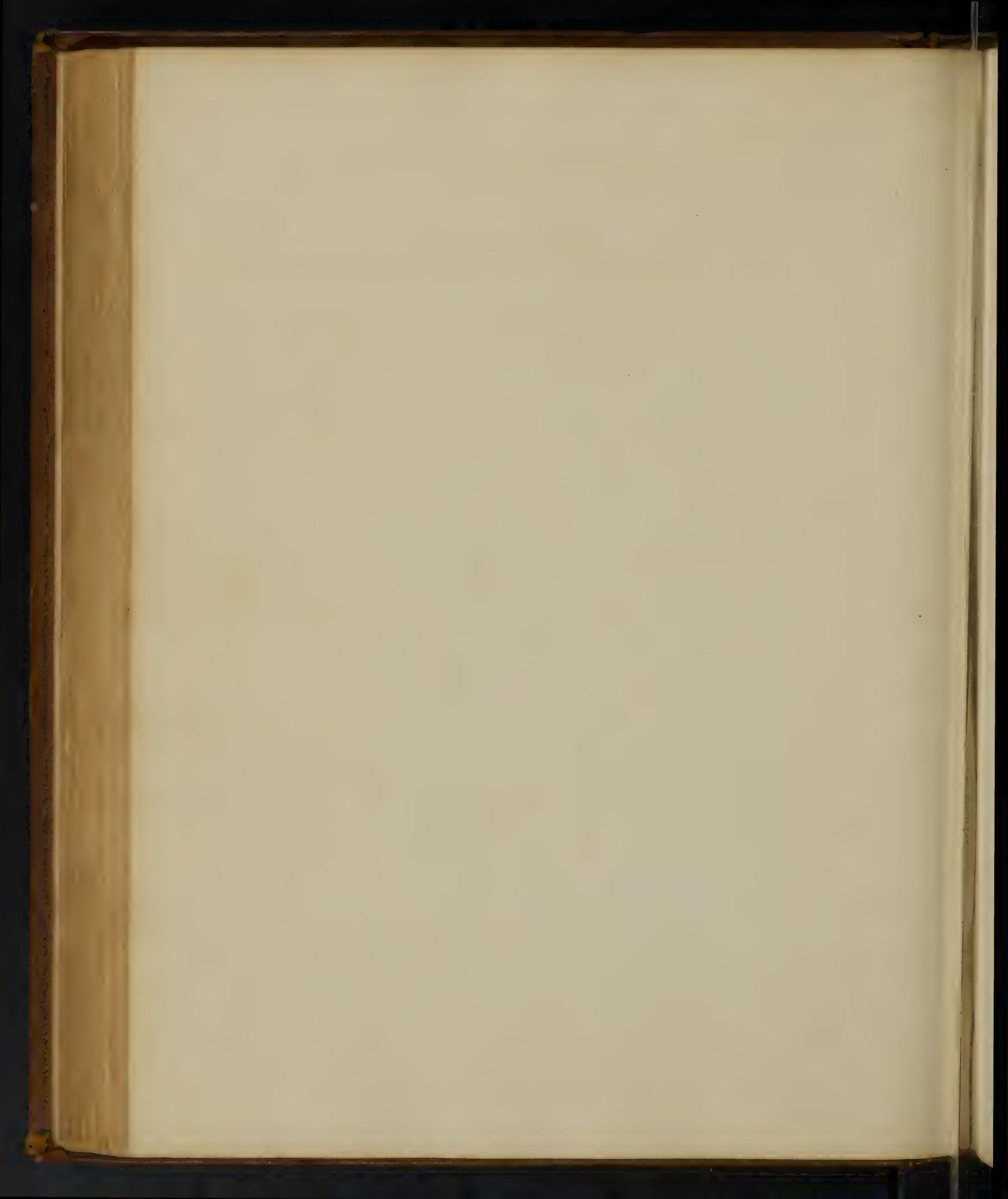












Prerogative Writs.

Writ of Mandamus. (Page 112. Gould.)

This is a prerogative Writ issuing in Eng. from H.R. & answers in some degree in its effect to the specific relief afforded in Ch. 31 Eliz. 110. It may issue. (Salk. 42.9) from Ch. 3 Emb. 1609 1705. Writ of right is now exercised in B.R. only.

It is granted in those cases only which relate to the government or the Public, & when without it there will be a failure of justice. 3 Blac. 527. Doug. 506. 4 Mod. 281. to enforce obediance to acts of the Legislature, & (in Eng³) to the King's Charters; to prevent disorders from a failure of Justice, & a defect of police. (3 Barr. 12.67) there being no other specific remedy.

Generally not granted where there is an adequate remedy by actions. Doug. 506. p. 4 15. 12. 148. Bouf. 3.77.

The Writ is grantable in Conn. by the Superior Court.

The object of the writ is generally to restore a person to some corporate or other franchises or rights which he has lost by public or the administration of Justice, & of which he is deprived; or to admit a person to the same rights &c. Esp. 661. 11 Co. 93. 3 Blac. 529.

The writ issues vs. some public officer, body corporate, or inferior lets commanding a performance of their official or corporate duty. 3 Blac. 528. 4 Mod. 52.

It is a writ demandable of right & the law allows it without imposing fees. 3 Blac. 528.

It lies to compel officers of corporations to call meetings

Prerogative Writs. Mandamus.

To hold elections to which they have it is their duty. Stra. 1000.
1157. 12091. St. Ray. 269 Esp. 662

To restrain a person to every description of corporate or
fines. Esp. 661. St. Ray. 431. 1 Sid. 14. E.g. If Town Clerk - Select
man, Constable &c. shall be illegally deprived of their offices.
June 17. 4. Bur. 1999. 1 Esp. l. 176.

To command persons in authority to do their duty. E.g.
To ye. Judge of an Inferior Court to proceed to judg. 1 Sid. 113.

2 Hilb. 871. 31 Bac. 535. b. To Ecclesiastical Cts. &c. of Probate,
in Conn.) to grant probate of a will, or administration
to whom it belongs to. Esp. 662. 31 Bac. 534. Gaith 457. Bal. 299. Stra. 552.

It lies to a Clerk of a Corporation, requiring him to deliver
a Ch. Book to his successor, on his being removed from office.
Esp. 663. 2 Stra. 879. 1 Will. 305.

Not, fixed by any general rule, what offices concern
the public or administration of justice to which one claims
to be restored or admitted. The writ has been much extended in
modern times. 31 Bac. 529. It is decided that the offices of Mayor or
Alderman - Common Councilman - Town Clerk - Constable
lay claim on Eng. parish Clerk 8480. 31 Bac. 530. 11 Co. 94. 2 Buls.
122. 1 Ray. 78. 1 Will. 143. 153. St. Ray. 211. n. Sid. 112. 1 Rol. 533. Bal.
173. 1 Esp. 371. 377.

So it lies to custom one to the place or office of Attorney in
an inferior Ct. 31 Bac. 530. 1 Lle. 75. 1 Hilb. 549. 1 Will. 11. So to our
County Court.

The office in these cases must be of a "certain permanent na-
ture." Therefore an officer under an establishment or institution
depending on voluntary subscriptions, not endowed, is not enti-
tled to it. Esp. 663. 1 Will. 11. 1 St. 18. 531. 4 I&G 125.

Prerogative Writs. of Mancamus.

But the Office need not be feigned. It is sufficient that it is an annual Office - that fees amount. Esp 666. 1st 12. 146. This rule extends the writ to all our public Offices on Com. To cause Com to command a County Treasurer to pay money to a Cred^t of the County - & to command Justices to lay a County Tax.

Where y^e Office is merely of a private nature the writ will not be granted. e.g. in Eng^e Office of Steward of a Lt. Baron. Esp 666. 1st 40. 1 Will 143. In Com. Offices of private Companies - as library companies w^t fall under y^e description of private Offices. & so Turnpike Companies incorporated, &c. - The grant of incorporation is analogous to the King's Charters. 3 Inst 528. n.

The writ never goes to enforce an act by a Court, magistrate, &c. - when it is uncertain whether he has by Law a right to do it. Esp 665. 1 Will 266.

For where there is another specific legal remedy, e.g. It goes not to a man to compel a transfer of stock - for case lies. Esp 666. 1 Doug 50 6.

It never is granted to compel a Co. magistrate to do an act, when the doing of it is discretionary. Esp 668. Will 5812. 132 16. 708.

If several are deprived of franchise, office to each must have a separate mandamus. They cannot join - the wrongs are distinct, & causes may be different. Esp 668. 9. Bath 433. 1 Will 200.

Modes of Granting the Writ.

It is not usually granted in the first instance tho it sometimes is. The usual mode is by a rule to show cause (Esp 669.) & this is not granted but on affidavit by the party applying. 3 Inst 528. 1 Will 199. 200. 3 Inst 111. Rule under suspending circumstances it will issue in the first instance.

Precogitative Writs.

Chandamus.

or motion. Esp. 669. Dux 160. E. 9. to sign process rate in Eng?

He is never entitled till there has been a default. He goes not to prevent a default. Esp. 670. Bell 199.

The writ is directed to the person, whose duty it is to perform the act commanded. Esp. 672. Dux 6436.433. Not to another to procure the act done.

Where the act may be to be done by a part of a corporation aggregate, it may be directed to the whole corporation, so to that part which is to do the act - but not to any other part. Esp. 637. Dux 694.701. 1 Harg. 52.

When sufficient cause against issuing the writ is not shown, the writ itself issues, at first, in ye alternative, to do ye act, or shew reason why not. 3 Blac 111.

If y^e Off^c. return a sufficient reason, he is excused the reason being true.

And at C. P. the return of the officer to C^c not be disregarded. But Cause lay for false return. Esp. 648. 1 Wm^t 111. Salk 32. Doug 131. & so by Stat. y^e King it may be disregarded, or in other cases pleaded to. Esp. 648. 3 Blac 543.

S. R.ay. 481. Our C^cs have adopted y^e reason of this Statute.

Since this Stat. if the return is false (which is a question to be tried by the jury) the party injured has a peremptory m^cdam^s, 3 Blac 111. & also an action on the case for false return. 3 Blac 111. Esp. 648.

At C.S. the only remedy for a false return is an action on the case. Esp. 648. 3 Blac 311. 11 Co 99. And if the false return were made by several, the action may lie w^t all or any, it being for a tort. Esp. 685. 3 Blac 544. Cartt. 17. 12. Action lies for suppression w^t in the return. Doug 2. 144. Judge R. says y^e action of trespass on y^e case was unknown till y^e Stat. Westminster 2^d. Rec. shows as to y^e above. J. P. J.

Prerogative Writs.

Mandamus.

But if any one of the several persons holds w^ts. & false return, or was overruled, no recovery can be had w^ts. him.

Esq 685. C. 172. S. Ray. 364

If the return is insufficient upon the face of it, a peremptory mandamus issues. 3 B. C. 111 Esq 685. Bull. 201.

If the return is falsified in the action on the case, a peremptory mandamus issues. Esq 686. 3 Bac 544. Sal. 430) provides the action is on the same Court in which the application for writ was made, i.e. in B. R. or our Sup. Ct.

If no return is made, an attachment issues; (Esq 685) for example, (3 B. C. 111 3 Bac 431. 2. Sal. 429. 434) after a peremptory rule to return of writ. — See 808 that the attachment must go to all the persons w^t have made a return. Contempt is punishable by fine, or imprisonment, or both, & in some cases with corporal or infamous punishment. 4 B. C. 283. Cro. C. 14. 6.

Prerogative Writs

Writ of Prohibition

This is a prerogative writ issuing generally from S.C. to provincial inferior courts from deciding cases out of their jurisdiction. 3 Bl. 112. 4 Bac. 240. Com. 47. N. N. 10. 39. 40. 12 C. 279.

Or it may also issue out of Chy. Common Pleas & Exchequer. 3 Bl. 112. 12 Wm. 476. Hob. 15. Palm. 523. 4 Bac. 241. 12 C. 58. 4 Com. 489. 176 Bl. 476.

It is directed to y^e inferior Ct. & Ct. party; it is founded on a supposition that the cause itself, or some collateral question arising in it, is out of the inferior Ct's jurisdiction. 3 Bl. 112.

The mode of obtaining a prohibition, is by a rule to shew cause why &c. in many instances affidavit must be made, that y^e cause or question to be out of the inferior Ct's jurisdiction. After which that fact appears from y^e face of y^e declaration, lib. &c. &c. of y^e inferior Ct. 4 Bac. 244. 10 Wm. 476. 1st. 549. Hob. 593. Hob. 79. 2. Ray. 1211.

Whether y^e awarding of prohibitions is ex. debito justitiae, or discretionary - authorities contra - Better opinion that it is discretionary. 4 Bac. 242. Hob. 67. 2. Ray. 3. 4. 2. 5. 6. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 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Precogitative Writs.

Prohibition.

Issue of the sufficiency of the cause suggested is doubtful; on a due of difficulty, the party is directed to declare in prohibition. (3 Bl. 113; 4 Bac 248 (620 & 736) i.e. to prosecute an action by filing a declaration at the opposite party, upon a fiction not traversable, that the latter has proceeded in disobedience to a prohibition before granted. Barron's 8. 148. T. & S. 9. 44. 12 Rev. 12. 5. 4 C. L. 151. 2. 620 & 736. 4 Bac 248.

The Declaration must follow the suggestion. The action is regularly proceeded with by a question of y^e sufficiency of y^e cause suggested, tried upon the pleadings. If the cause suggested is adjudged sufficient, judgment with nominal damages is given for p^rg^t. prohibition issues. 4 Bac 248. m.

If insufficient, judgment for Def^t. a writ of consultation awarded, i.e. a writ issued upon deliberation or consultation had respecting the cause to y^e inferior let to be there determined, notwithstanding y^e former fictitious prohibition. 3 Bl. 114.

So too a writ of consultation is sometimes granted where there has actually been a prohibition, e.g. the party prohibited may take a declaration, pursuing the suggestion, to traverse the fact, on which prohibition was founded, and if y^e cause is found for him a consultation issues. 3 Bl. 114.

The Court itself by its own mere motion sometimes award a consultation. e.g. where upon further consideration it thinks the suggestion insufficient. 3 Bl. 114. 4 Com. 517.

Disobedience to the writ is a contempt, punishable by fine, imprisonment at the discretion of the Court.

4 Bac 262. T. & S. 9. 40. 279. 4 Bl. 114.

It is also a contempt to commence a new suit in y^e same Court for the same thing after a prohibition. 4 Bac 262. also 599. 1. 8 Com. 111.

Prerogative Writs.

Prohibition.

On the attachment for contempt, the plff. recovers damages & costs for the others proceeding after the prohibition.
Stat. 348. 3 Lr. 360.

We have a Stat. vesting the power of granting prohibitions in the Sup^r. Ct. enabling the chief judge or 2 associate Justices to do it in vacation. This Stat. adopts the English law on the subject. Stat. 347. 8.

Prerogative Writs. 3

Habeas Corpus.

Writ of Habeas Corpus.

This is a writ by which a person restrained of his liberty may be broug^t before some Court, for some special purpose, either on his own application, to be relieved from confinement, or to obtain justice, or upon that of some other person, having a right to require his appearance. 3 B&C. 129. 151.

of this Writ the Kinds are, various. 1st. Ad responderem. This lies when one has cause of action, &c. another, confined by process of an inferior Ct., to remov^e the prisoner, so as to charge him with a new action in the Ct. above. 3 B&C. 129. 3 B&C. 21. 1^o year 197. as Mod 197.

2^d. Ad satisfacendum. This lies when judgment has gone utr^t the prisoner, &c. plff n^t bring him up, to serve him with process of execution. 3 B&C. 129.

3rd. Ad faciendum et recipiendum. Which lies where a person confined by process of an inferior Ct. with his remov^e the action to a Super. Ct. to be decided, there his body is remov^e by Habeas Corpus. the proceedings by certiorari. 3 B&C. 129. 3 B&C. 2. 15. 1^o year 235. 23 Jy. 197. frequently called "Habeas Corpus cum causa."

This kind of Habeas Corpus is demandable of common right, & without any motion. 3 B&C. 130. 2^o year 306. It instant^y suspends all proceedings in the Ct. below, & any subsequent proceedings are void as *coⁿcurreⁿ non^t iuris*. 2^o B&C. B&C. 15. 1^o year 352. 12 o'clock 666.

It is granted, when, on other of right, when it is abat^e a right, & rem^t; or rather a proceeding is awarded. e.g.

Peculiar Writs. 3

Habeas Corpus.

If he be held longer than an inferior C. or master should, then remove it. 3 Bac. 15. 3 Cal. 8. These three kinds not in use here.

8 V^t. ad Testificandum. When a party wishes to improve a prisoner as a witness. 3 Bac. 3. 3 Rec. 51. Com. 6. 17. 48. Kirby 137.

Formerly held in that this may be an escape of a prisoner in execution. 18 Ed. 3. 3 Co. 44. 2 Bac. 238. Vide title "Sheriffs". Not so now. Prisoner released by usages of the Army etc. - no escape. 1 Rec. 72.

Never granted to bring up a prisoner of War. Doug 403.

But if the Staff or factor, in any case, gives the prisoner unnecessary liberty; as to go a long way, or goes with him in a very circuitous way. it is an escape. 1 Ed. 116. 2 Bac. 238. 2 Rec. 14. Rec. 202. 3 Co. 44. See "Sheriffs".

There are some other kinds of Habeas Corpus. 3 Bac. 2. 3. But ...

V^t. The principal writ of Habeas Corpus is that ad subjiciendum. directed to the person holding another in custody commanding him to produce &c. to do, submit to, & receive whatever the C. or judge shall award. 3 Bl. 131. et Com. Law went unfriendly to the liberty of the subject 1 Bur. 631.

This is the writ by which release is obtained from every species of illegal confinement. 3 Bl. 131. Rec. 92. 93.

A person imprisoned by either house of Parliament for a contempt, cannot be discharged by this process. 8 & R. 314.

It arises at Com. Law from 15 H. 8 & 13, 1st & 2d fiction. Piracy, or being a sailor. from C. 15. 2 Rec. 543. 4. Rec. 8. 2 Rec. 26. 3 Bl. 131. 2. 3 Bl. 131. 2. 2 Rec. 198. — except.

Prerogative Writs.

Habeas Corpus.

that in case of commitment for a crime, the Co. only take
Bail or remand. 3 Bl. 132.

Whether it may issue from the King in vacation. 2a.
3 Bl. 132. 3 Bac. 3. 2 Stat. P. C. 147. Seems not.

Any of the judges of H. R. may issue it in vacation.
3 Bl. 131. 6 ro. I. 543.

It is directed to the gaoler or other person detaining, to
produce the Body with the cause of his detention. 3 Bl. 131.
Stat. 330. 2 May. 586. 618. And the Co. as the case requires,
discharge, admit to Bail, or remand. 3 Bl. 134. 3 Calod. 22.
West 330. 346. That the prisoner may not continue under
constraint of liberty, without cause.

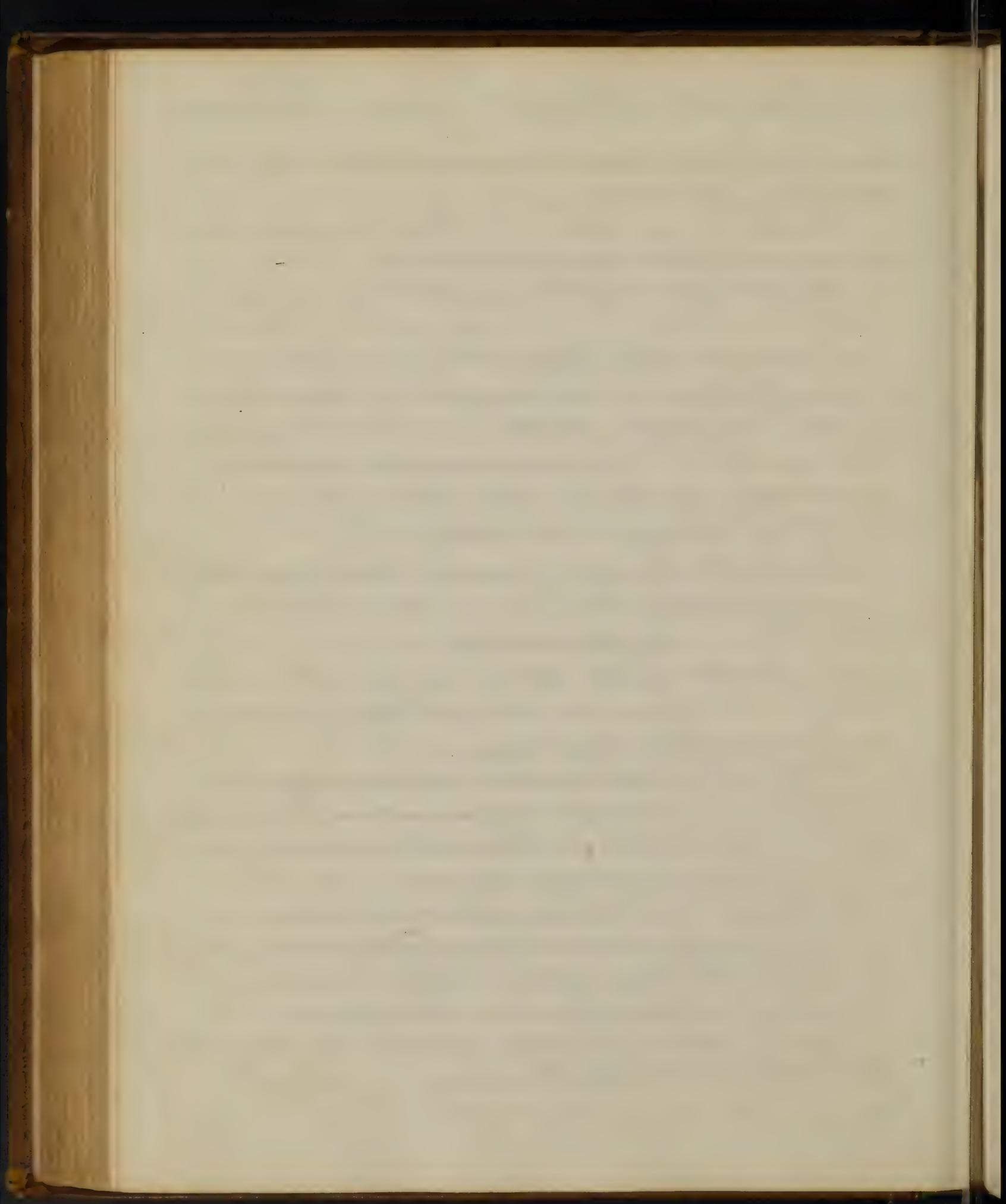
The Com. Law having been evaded by the judges, a Stat.
was passed, 32 Car 2^o which now in a great measure reg-
ulates this writ. 3 Bl. 135. 6. 3 Bac. 7. 8.

Since this Stat. any of 7:12 judges may issue it in vacation.
3 Bl. 136. This for persons committed by the King or his Council,
or a Secretary of State &c. 3 Bl. 135. 6.

It lies not for persons committed on execution or conviction; ^{but}
by Stat. 32 Car 2^o it is denied in cases of commitment for treason, fel-
ony (or certain other cases) under special circumstances, treachri-
ties. 3 Bl. 136. 3 Bac. 9. 10. Calod. 429. Star 142.

It lies in favor of children, wards, &c. unreasonable
confined by parsonal guardians &c. 3 Blac 15. 3 H. 6. 526. 2. 2. 128.
Star 492. A such Writ, may be issued by the friend of the
person confined. Star 492. B. 606. 3 Calod. 21. B. 631.

It is obdiance to the Writ - furnished as a Bonum pte.
3 Bac. 10. H. 8. B. 68. 12. Calod. 666.



Precative Writs.

Writ of Audita Quæsta. By law, nine.

This writ issues where a man has a good reason for not paying an Execution, but has no day in Ct. on which he can make his defence. As if he has satisfied the judgment in some way, as by account & satisfaction etc. So if the Execution is paid up and a receipt given, & no endorsement of the payment on the Execution, & then the Creditor denies that it has ever been paid, he sues the Execution. Then he might have an action on the case, but not however till he has paid the money at several times, which might be very inconvenient. He may in such case have an Audita Quæsta to stop the Execution, & does more, it operates as a discharge of the Execution.

Now if he has paid the debt & dont plead payment at the Trial, he cannot have this writ, for then he has had a day in Court. It is because the party has no day in Ct. that an Audita Quæsta issues, or is granted.

So if he might have had a day in Ct. but has no reason to expect judge. This writ will lie. As if A has a Bond to B. and B. comes & takes it after a suit is commenced but does not take up the Bond it being in the hands of an attorney. B. says you will take care to stop the process on that suit. A. yes says. A. & then directs his attorney to take judge. w^t B. which he does. An audi. Quæsta in such case to afford refus^t B. y^e judgment.

It may be that Judge has been obtained B. one who by accident has never had notice, as if there are two

Prerogative Writs

Audita Quæsta.

men of the same name & the writ was served on y^e wrong one. He does not appear & judgment is rendered by default of him. Then he has property no day in Ct. Execution goes w^t him. He can't be sure have an action on the case for his damages, but this is not an adequate remedy. An Audita Quæsta will be granted.

And where the practice prevails of confessing judgment on awards, if execution were issued upon them, improperly, this writ might be had to obtain relief. See lit award.

Mode of obtaining this Writ.

In Eng^t. I have seen several cases, for all of ch^r. ch^r application is to the Chief Judge of the Common Pleas. But suppose that in those cases the judgment was then rendered. From these cases we have (in Com.) as option the judge of the Com. Pleas in all cases. But I think the application shd be to a judge of that ct. where the judge^t was rendered. This writ is not to be granted of course, it is not ex debito justitiae. If so, every one who did not wish to pay an exec^t would procure this writ. The judge has an ex parte hearing. The petitioner produces his proof & it appears that there is cause y^e judge signs the Writ. He can't serve it without proof.

This writ is in the nature of an action on the case. It summons the judgment creditor to appear in Ct. & if the complaint is well founded, the Debtor recovers damages, & y^e Exec^t is discharged.

A bond is always given upon granting an Audita Quæsta, conditioned that he will prosecute his claim abode the judgment. And the Audita Quæsta will ch

(Prerogative Writs.)

Audita Quarela.

Bond is a complete suspension as to the Execⁿ. from the moment it comes into the Officer's hands. The Officer must stop the proceedings however far he may have gone. If he has committed the Debtor, he must discharge him. if he has taken property he must give it up. The Execⁿ is entirely suspended & destroyed.

If an Audita Quarela is issued without a Bond being taken it is void in toto. And no Officer sh^rs. execute an Audita Quarela until it appears that a Bond has been given, as large as the demands on the Execution. It sh^rt be larger, in order to cover the costs. The Officer can judge as to the goodness of the Bondsmen.

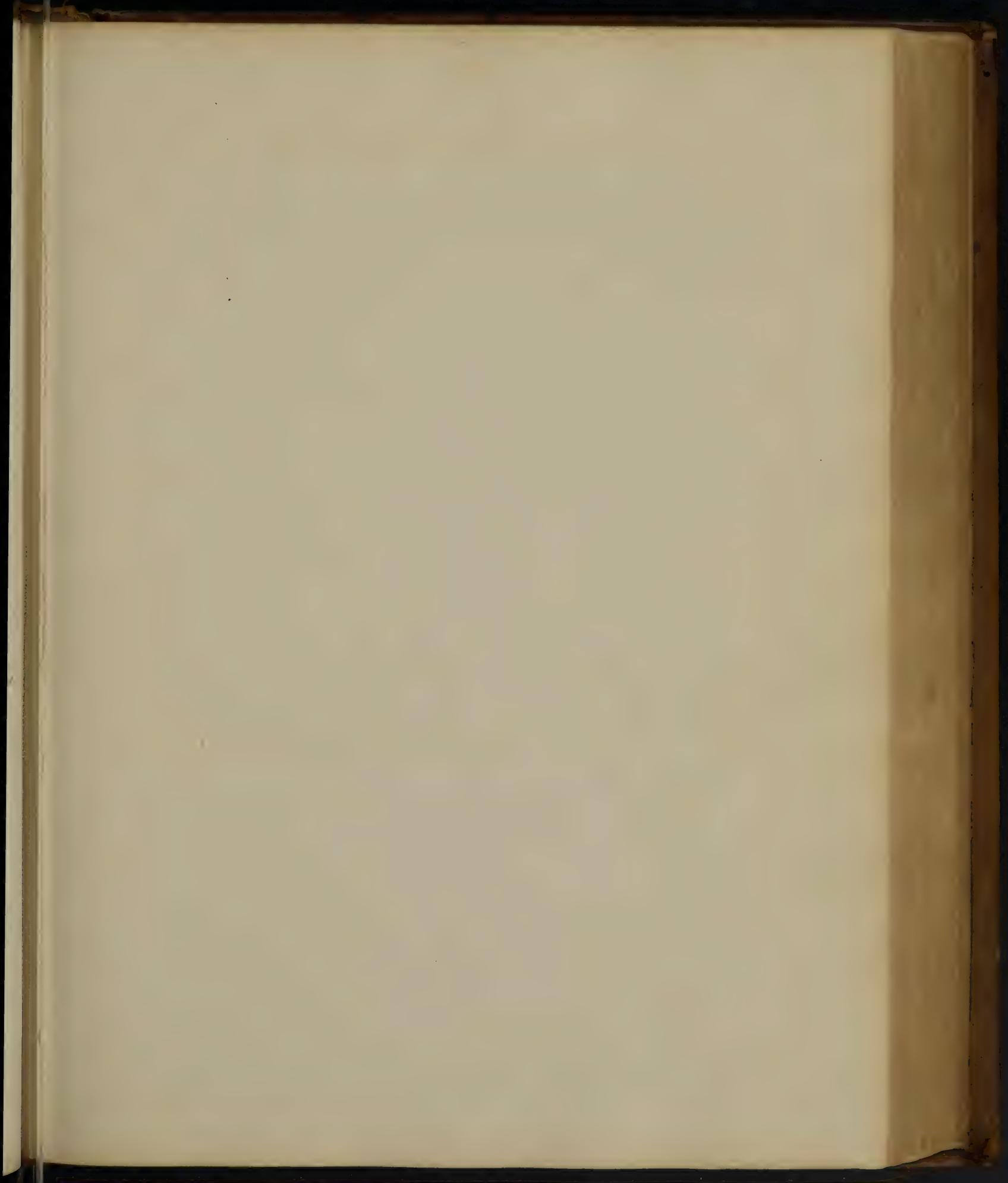
There is a similarity between this Writ, & a Writ of Error. This difference - A writ of Error stops the Execⁿ from proceeding, till after trial of the error - but it is not a complete suspension. Audita Quarela is. Again if a writ of error is pronounced & the execution is partly executed it cannot be stopped. Seeas on Audita Quarela.
Bacon Audita Quarela.

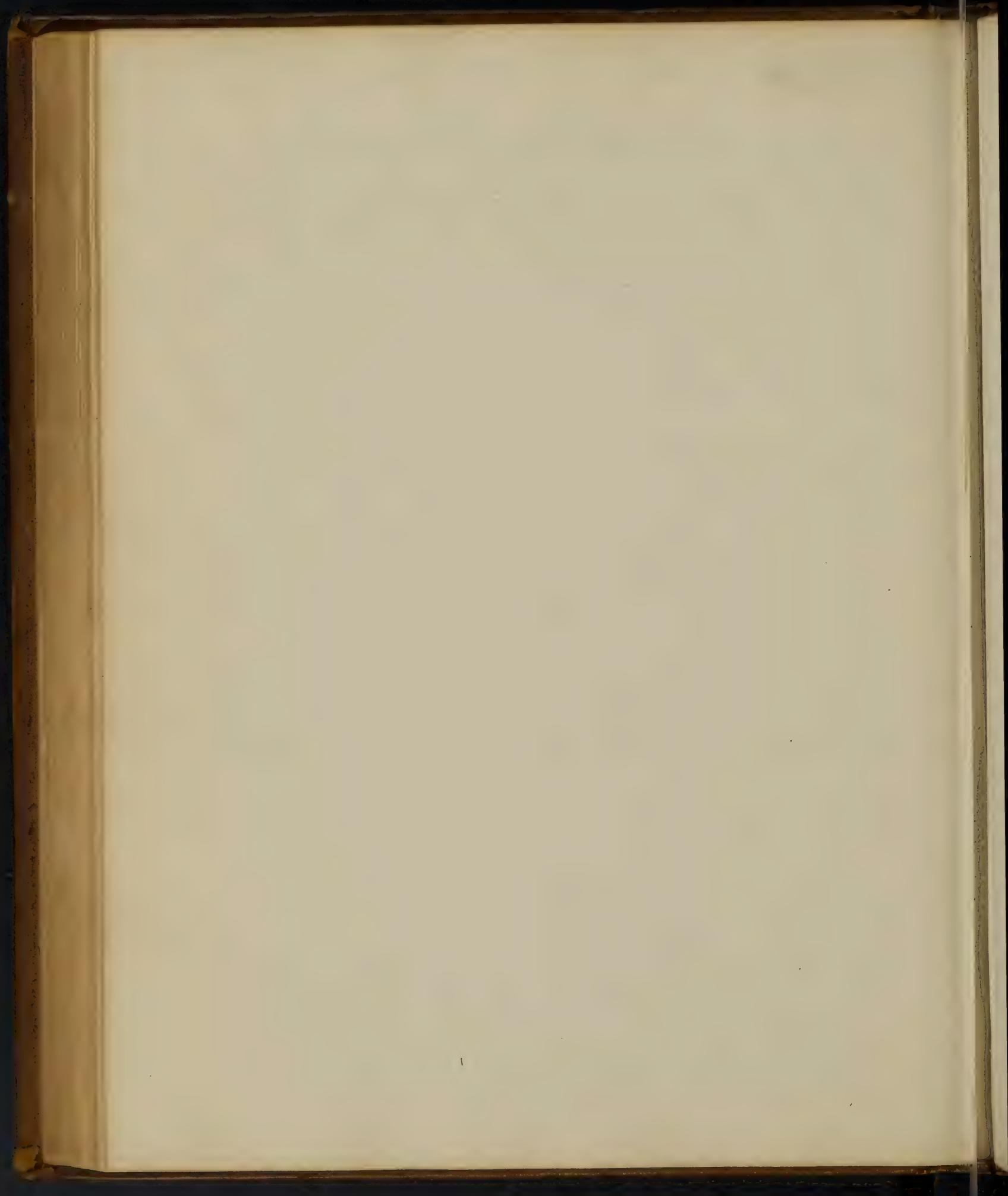
Prerogative Writs. 3

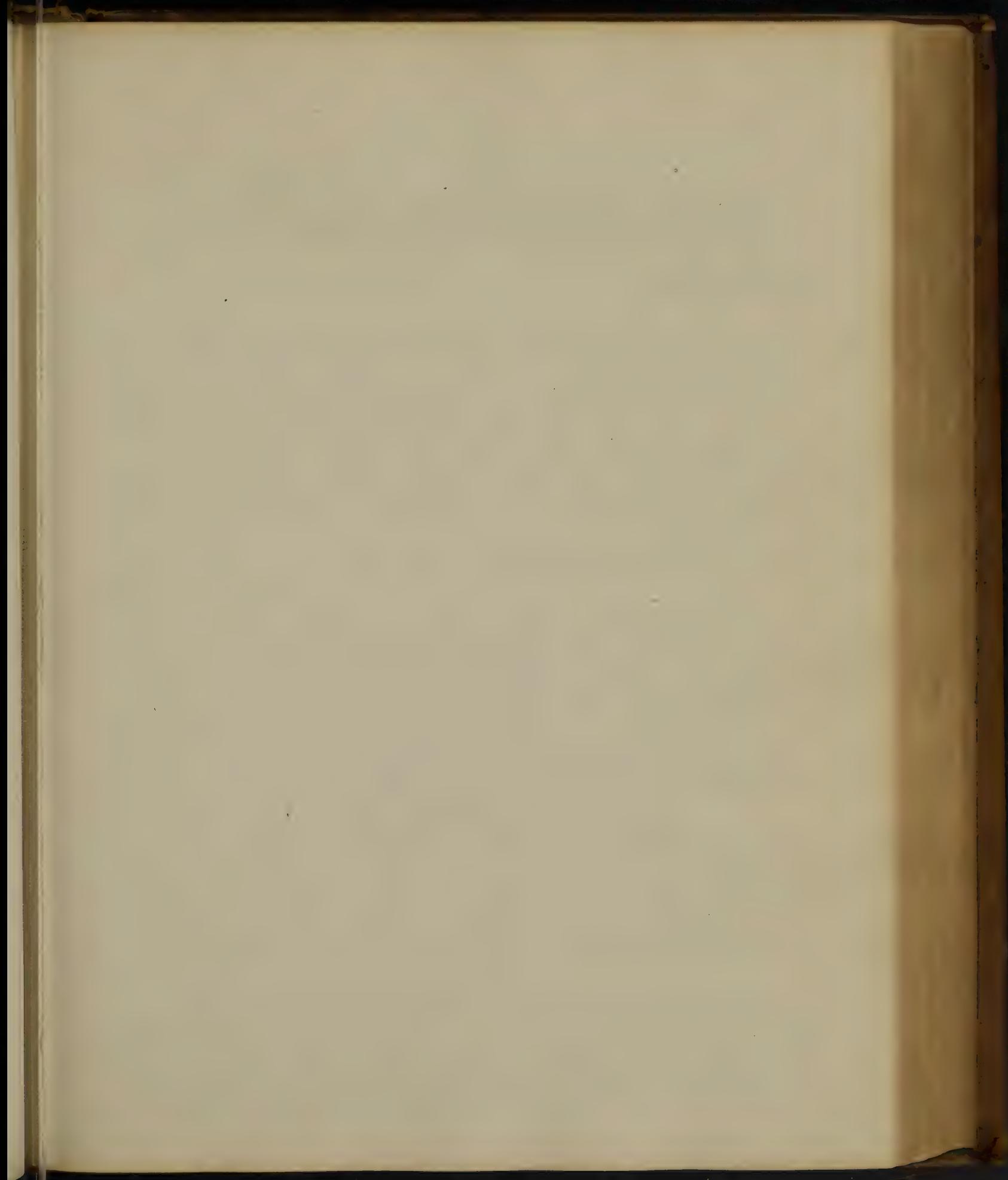
Writ of Due Warrant. by ch. judge

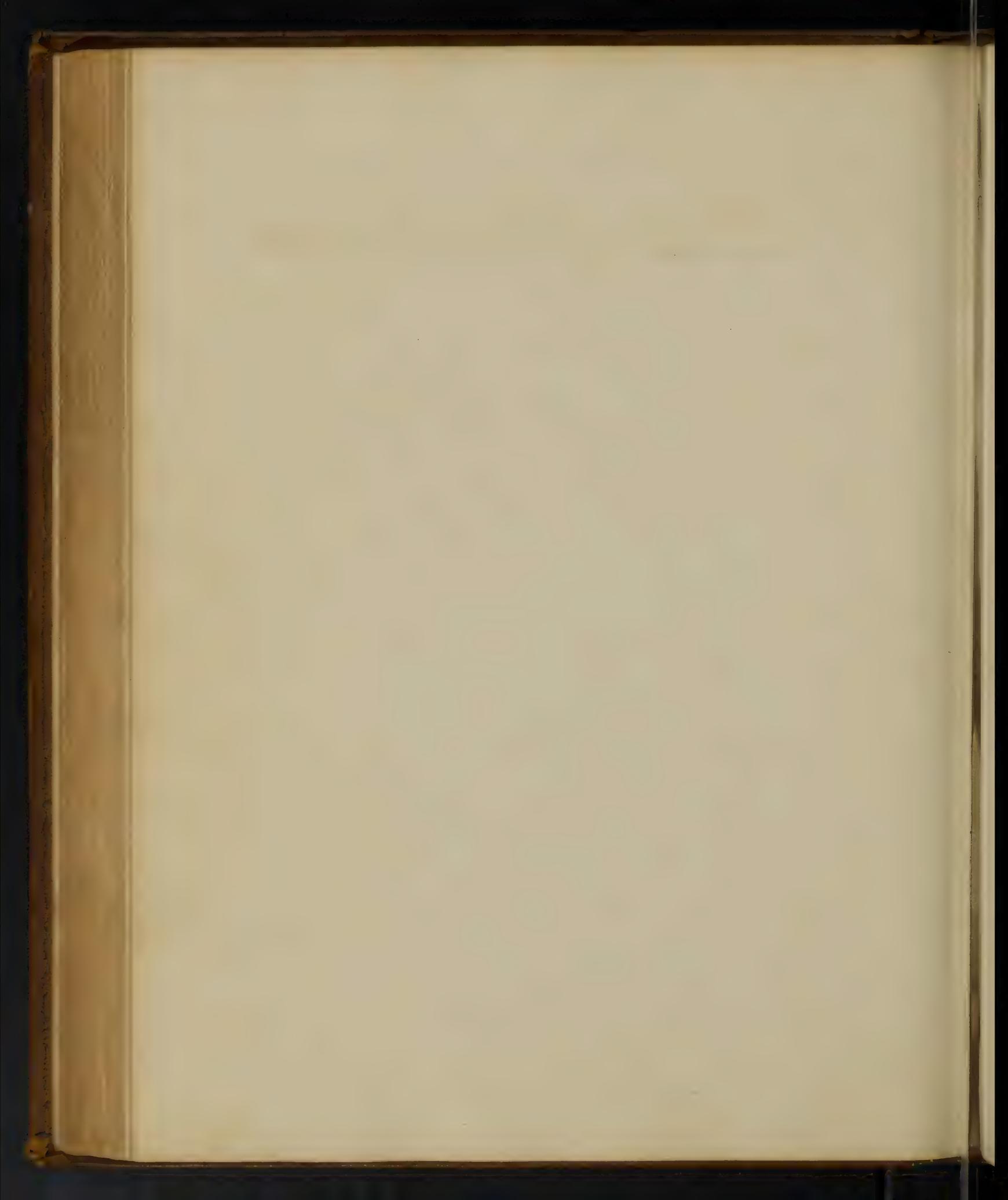
This writ issues directing the person or persons before whom it is issued, to exercise a certain office. It may be had when one person exercises a right belonging to another. As the various franchises in Eng^d. such as having a Market, &c. &c. have but one case of this kind in law. (that is in U. S.) & that is a right held by a man this being power to keep a public house between Hartford, & New Haven.

This is usually issued where corporations, or individuals of it exercise powers which do not belong to them. As when one claims an office which another exercises because he was improperly chosen. Then the individual may have this writ. This is called the relation. So when the corporation exceed the limits of their charter, the public may have this writ prefixing at the corporation in their corporate name. 26^o 28. ydlo 191. 21 Coll 205. Stra 116. Coheretatis to show the forms 327. 544. 561. Stra 299. L. Ray^o 1559. 18a Ch 14. 13 How 288. 2. 13a 1869.









Pleads & pleadings.

(By Goul. d.)

Pleadings are defined to be the oral trial alterations b/w
between the Plff. & Defend. in a suit, put into legal form & set
down in writing. 3 Bl. 398. 398. 10 Co. 133.

Antiently in Eng. all pleadings were oral. The counsel
delivered on his pla viva voce, & then it was reduced to
writing by a Clerk or Prothonotary. Hence they were frequent-
ly called in Latin as French Parol; thus it is spoken of the
parole remouring.

In Great Britain, from the time of William the Conqueror
or until the 36th Edward III. pleadings were in Norman French,
which is properly the language of the Law. From this time till
the 40th of the 11. they were in Latin & by a Stat. of that year
they were reduced to English in which language they have ever
since continued. 3 Bl. 317. 1 Parl. 29. 23. 4. Bac.

The English reports till the time of Edward the 2nd were in Nor-
man French, because the pleadings were in that language
the greater part of them are now translated.

All pleadings in Civil actions in Eng. & in this Country are
required to be put into writing.

In strictness then, pleading is nothing more than set-
ting forth upon the record such facts as constitute the plain-
ground of the Plaintiff's demand or claim on one hand, or of
the Defendant's defense on the other. This is the precise definition
& see supplement at end of the title a.

Placing & Pleading. General view.

of Pleading. 3. T. R. 159. May. 278.

Sand. Mansfield has observed that the substance of the rules of Pleading are founded in the strongest sense in the second & the closest Pages; & Sædebon, that it is the most honourable part of the Profession. 1 Burr. 319.

The great object of Pleading is to present the claim of the plff. & the defence of the Dfend. in such a manner as will most conveniently admit of an easy & impartial trial, so as to bring the claim & defence on both sides to some precise definite point. Without a system of rules in pleading there would be no uniformity in the administration of Justice. 1 Burr. 319.

Pleading is strictly a syllogistic process. Every good declaration & every good plea contains the elements of a good syllogism. A Declaration is not a syllogism in form, but it is in substance one. Thus to exemplify the proposition... Suppose there is a declaration in Trespass quare clausum frigida. The plff is the pleader. The syllogism is this. Major proposition - against him who has forcibly entered upon my Land, I have a right by law to recover damages, minor prop. the Dfend. has forcibly entered upon my Land Conclusion. Therefore against him I have a right by law to recover damages. The major prop. contains the legal principle on which the plff founds his claim; the minor contains the facts to which the legal principle is to be applied in the particular case; the conclusion is an inference of law from the application of the principle to the matter of fact stated. These propositions then must all be capable of being denied. The Dfend. is at liberty to deny the legal

Pleads (and) Pleadings. General view.

principle, the facts contained in the minor proposition, or the conclusion. The rules of Law have settled how they are to be denied. The first is to be denied regularly by an issue in Law, called a Demand.^{*} The operation of a demand is to admit the matter of fact so far as it is properly stated, but to deny the sufficiency of it in Law in favor of the pleader. The minor prop. is denied by an issue in fact, which may be either a general or a special issue. If both propositions are admitted, or not denied, (& this amounts to an admission), the conclusion can no otherwise be answered than by admitting new matter & this must be done by a special plea in Bar. He cannot traverse the conclusion. He may deny it by a special plea in Bar, as a release for instance. The plea of a release presupposes the major & minor propositions to be correct, but avoids the conclusion by something new. This plea also contains the elements of a good syllogism. It is as follows. If he upon whose land I have forcibly entered release the trespasser, his right to recover damages vs me has ceased; the plff has released the trespasser complained of; therefore his right to recover damages against me has ceased. Here the plff again must be at liberty to deny either of the propositions. If he would deny the first, he must demand because it denies the legal principle. If the second, he will deny that he ever released. If he denies neither, he can avoid the conclusion only by new matter contained in a special replication. As if the release was obtain'd by fraud he must state the facts. This view of the general principles of pleading may be pursued, from the Declaration to the Committee.

* See Supplement note b.

Pleadings and pleadings.

1st. The writ.

The first stage in a suit is, in England, "the writ." 3 Bl. 273. Comp. 454. 7 J. R. 42.

This is a mandatory letter directed to the Sheriff, and issued by proper authority, to compel the appearance of the Defendant. 3 Will. 14. 1 B. & C. 41. East. 233. 2 Burn. 260.

The suit is regularly & for most purposes commenced, from the issuing of the writ; but in U. S. it is not commenced ^{and this is often the case in the United States, because the cause of action & the party thereto, are not known at the time of the filing of the bill, because the bill in this country is analogous to a bill in Chancery. Hence it is considered the original commencement of a suit. See aucht. supra.} until the filing of the bill, because the bill in this country is analogous to a bill in Chancery. Hence it is considered the original commencement of a suit. See aucht. supra.

In Conn. the Declaration & writ issue together. In New ^{eng.} Eng. the writ is the foundation of the suit here, as well as in England. But the first stage of the suit here is as much the Declaration as the Writ. The suit is not considered ^{here} commenced to all intents & purposes until service has been made upon the Defendant, for it has been decided by our Supreme Court (1 Root 486.) upon a plea of tender, whence writ issued & no service made before tender that it was good tho' he did not tender the costs.

For many purposes however the suit is commenced from the issuing of the writ, because the cause of action must exist at the date of the writ. As if a writ issues to day upon a bond due to morrow & not served till the next day the plff. cannot recover.

2d. Declaration or Complaint.

The first stage of the pleadings is the Declaration or Complaint. This contains a statement of the grounds upon which the plff. founders his recovery. The writ is not a part of the pleadings.

Pleads and pleadings. Declaration.

All the statement it contains is made by the Count. There is here no material allegations or alterations. 1 Bac. 75. 1 Inst 172.

Plowd. 84. 3 Bl. 293.

The words Declaration & Count have been used as synonymous; but a distinction has lately obtained. If there are two or more Counts or distinct statements in the cause, each distinct statement is called a Count, & they all together the Declaration. Yet when there is but one Count they are synonymous.

The Count or Declaration is but an amplification or exposition of the original writ. The writ itself must name the cause of the suit, & the parties, but it states it very briefly. It does not state the special facts out of which the cause arises. These are reserved for the Declaration. 3 Bl. 293. 4 Bac. 5 Com. 18. Salk 219.

We have no concern with what is called an "ac etiam" in Com. This is a clause inserted in the Bill in B.R. for the purpose of giving that Court jurisdiction over matters purely civil. This Court had original jurisdiction of no other civil causes except torts, for which a fine is due to the King. But when once the Defend. is in the custody of the Marshal of the Court, he may be charged with any personal civil action whatsoever. Of real actions they had no cognizance in this way. The writ then may contain a clause charging him with a tort, as e.g. trespass & then "ac etiam" with debt also. The first cause of action gives the Court jurisdiction over the person, & then the "ac etiam" enables the plff. to declare agt. him in the personal civil suit.

The Pleadings include the Count in the largest sense of the term. In the limited sense of the term, they embrace

those

Pleads and Proceedings.

allegations only, which succeed the count, & they denote those allegations which the Defendant makes by way of defence to the action & those which the Plaintiff makes to fortify the Declaration. 4 Bac. 1. b. 8. 3 Bla. 299.

The first stage of the pleadings then in the limited sense of the word is the Defendant's Plea. 3 Bl. 301. The pleads on the Defendant's part are divided into two kinds. viz.

1st. Dilatory pleas. 2d. Pleas to the action.

First. Of Dilatory pleas. These are such as tend to delay the suit by questioning the mode in which the remedy is sought, rather than by questioning the cause of the action itself. 3 Bl. 301.

This first class of the Defendant's pleads admit of a subdivision. According to Blackstone they are of three kinds, viz. 1st. Pleas to Jurisdiction. 2d. Pleas to the disability of the Plaintiff. 3rd. Pleas in Abatement. The two last who often confounded are as distinct as any other plea. These three classes comprehend the whole of dilatory pleas. A different division is made by other writers. The propriety of this division is questioned by Laws. It is however immaterial as they embrace all descriptions of dilatory pleas.

1. Pleas to the disability are often called pleas in abatement & so are pleas to the jurisdiction sometimes. Abatement has been considered as a general term including all dilatory pleas whatsoever. But improperly. The form of this is distinct from either of the others. The object & effect are different from either of the others; therefore it is illogical & improper to call a plea to the jurisdiction or disability of the party a plea in abatement. 4 Bac. 35.

Pleads and pleadings.

Pleads of the second kind are . . .

2nd. Pleads to the Action. A plead to the action is an answer to the merits of the plff's complaint, & denies the cause of Action entirely. A plead to the action may deny the plff's right of recovering in three ways, either 1st. by denying the plff's allegations, 2nd. by confessing & avoiding them; or 3rd. by matter of EstoppeL this denies the plaint's right to make the averments. This is generally considered as an avoidance of the plff's allegations, but it is not strictly so.

These pleads are of two kinds, 1st the General issue, where the allegations are denied; 2nd by a Special plead in bar, where there is matter of avoidance; 3rd. by estoppel, by a plead in bar to be sure, but not by matter of avoidance. 3 Bl. 303. 305. 6 Laws 37. 8. 115. 130. 140. 3 Bl. 305.

There is another mode of denying the plff's right of recovery tho' he cannot by another plead. The way in which he may do it is by Damnum. This is not in strict propriety a plead tho' it is sometimes called one. It is not a plead for it denies no matter of fact, nor alleges any new matter. It only says "I am not bound to plead". The form also shows this. According to the form in Eng. the Defend. after saying the plff's declaration is insufficient proceeds to say "for want of such sufficient matter the Defend. is not bound to make any answer thereto". This is I think strictly a proper view of a Damnum. This has been clasped however with pleads to the action; for admitting it to be a plead, it is not a plead to the action, for a Damnum may be taken as well to any other point of the pleadings as to the Declaration. A Damnum then is a mode of denying the plff's right

Pleads and pleadings. General rules.

of recovery, but not a move of denial by plea. 4 Bac. 129. 30.
Inst. 72^o. 5 Mod. 132. Thus far of the general view of the
mode of pleading. —

Lecture II.

I shall lay down some general rules relating to
pleadings in General.

In all pleadings two things are necessary. The first &
most important is that the substance of the plea be suffi-
cient, or in other words, the matter alleged must be suf-
ficient of itself, and secondly that this matter or substance
be deduced & expressed according to the forms of Law. If ei-
ther of these is omitted the pleadings are bad; if the former
it is bad in substance, if the latter it is bad in form. Rob. 164
There are different ways of taking advantage of these omis-
sions. They are both good ground of Demurrer. Omitting
the first is good cause of General Demurrer, the last of
Special Demurrer. — Camp. 683. Laws 45. —

In all pleadings it is necessary to state facts only and no
may be conclusions from facts, but it is never necessary to state
conclusions of Law. True particular laws & customs are ple-
aded when the Court cannot "ex officio" take notice of them,
but the general rule refers to the general law. Customs then
which are pleaded are mere exceptions to the general
rule. The conclusion from a fact, is a conclusion from a
fact stated in the Declaration. It is not then a substanc-
ive, independent act of itself, for it is inferred from a fact
expressed in the Declaration. This is "conclusio facti de facto"
5 T. R. 70. Doug. 159. Laws 46. —

Rule 2d. Another general rule in all pleadings is, that
every plea should be direct, not argumentative, nor by way
* See Supplement C.

Pleas and pleadings. General rules.

of recital. The averment of every thing material must be positive, & this general rule requires one thing, that things immaterial need not be directly stated, as mere matter of induction.

But no fact however important it may be, need be stated by way of direct positive averment, if it cannot be distinctly traversed by the rules of pleading. By the rule last mentioned is meant, that the party pleading should state the principle fact itself direct & in positive terms, not the grounds from which he would infer the principal facts. This he cannot do under a "whereas", but must aver it directly & precisely. Thus if A. in assault & battery should declare against B. that "Whereas" &c. it would be ill, for the general issue would be absurd; whereas he did not "x" and verdict cannot cure this defect, it is substantial. This is stating the material thing indirectly. ²² How. 128. 1 S. & S. 303. p. 72. 458. Sawy. 75. 4. 13. 2. 4. 4 Bac. 97. 22

But it has been held & seems now established that an averment following the words "whereas", "tacit", "prologued" is generally sufficient, notwithstanding the rule above laid down.

¹ Gant 117. note ¹⁴. 1. 8. C. v. 194. Sawy. 47. 69. 2. 6. v. 278.

According to this rule then, it is apparent, it is not sufficient for the party pleading to state the mere evidence of the principal fact to be established. This amounts to nothing better than argumentative pleading. Thus in ¹ Indelatus ² assumption, if the plff. should state that the defendant became indebted & became liable to pay him; the declaration would be insufficient, because the indebtedness and consequent liability are the mere evidence of the implied promise. The indebtedness of the defendant & consequent

(* see Supplement, &c.)

Pleas and pleadings. General rules.

liability is all that is necessary for the plff to prove, consequently they are the evidence of the promise. So also in a note of hand, he only describes the instrument, which is merely the evidence of the promise. This declaration is bad & has been so holden by our Courts on a writ of Error.

To in trover, if no conversion (which is the gist of the action) is alleged, the Declaration would be bad, for demand & refusal are only evidence of a conversion. They are not the conversion itself.

Suppose one states in his declaration that J. S. will swear truly that the defendant did promise to pay the plff at such a time, such a sum of money; this is evidently bad, but not more so than the others in point of principle, for the oath of J. S. is stated, which is the evidence of the promise. Cro. I. 333. 2 Root 73. 1 Saund. 274. note.

3d. Rule. Another general rule in all pleadings is, that each party admits as much of his adversary's allegations as he does not deny. Having a right to deny if he does not himself admit them. This rule holds thro all the pleadings. Each party's plea is to be construed most strongly against himself. If therefore two constructions may be put upon a plea one in favor & the other against the party pleading, that construction which operates against him must be adopted, since it is presumed that each party will make the best of his own case. If it were not so, chicanery would prevail to prevent the course of justice. This rule holds in all small actions cases, as in written contracts. 4. 18mo 2. 73. Instl 303. No. 6. 234. good auth. Ostrom 302. Lams 522. Dated 186.

Pleadings and pleadings. General rules.

4th Rule. Another general rule is, that in pleading traversable facts, it is in general necessary for the party pleading to allege the time & place. Some time must always be stated, yet he is not bound to prove a time, except where otherwise it would work a variance. A place must be laid for sake of a venue. So on transitory actions some place must be stated, because according to the strict rule of the common law, the action must be tried in the very county where the action arose. This rule of Com. law is varied from, by fiction, continually. This is however more formal. Were it strictly held to, no contract written, or bonds executed abroad could be sued on this country. In Eng. they evade the rule in this way: If a bond given in New York be sued upon in Eng. they state New York to be in the U. States &c and "in the parish of St. Mary Le Bow in the ward of Cheap." & this fact is not traversable.^{* Laws 57. 8.}

In actions b't to recover personal chattels, or for injuries done to them, it is a general rule, that it is necessary that the number, quantity and price of them should be stated; but it is never necessary to state the truth in these particulars, except where a mistake in either of them would work a variance. As in trespass, he must state that Difend. took a certain number of hens, & if he can prove he has taken but one he will recover.

These are regularly but matters of form, except where a variance would be made. Thus if the plff. should declare that the Difend. made a promissory note, in which he bound himself to pay 100£ when in fact he bound himself to pay only 90£ this mistake would be

(* see Supplement, 2.)

Pleads and pleadings.

fatal. The terms of a contract must be stated exactly as they are proved. In Torts, there is no matter of variance. Laws 49.

5th Rule. It is also a general rule that surplusage does not vitiate the pleadings. "Utile per inutile non viciatur" is a maxim of the Law; but still repugnancy in a material point will vitiate any plea. 2 East 333. Laws 63. 6 Inst. 549. 1 Inst 303. Laws 42. 64. 170. Carth. 288. 9.

(By surplusage is meant matter wholly unnecessary, or in other words, it is where a party having alledged sufficient for his cause proceeds to alledge still farther, something foreign to his plea. Now if the party state things neither good nor bad, they cannot injure the plea. 460 42.)

• Repugnancy is a self contradiction in the Pleadings, & consists of two or more averments of the party, being inconsistent with each other.

It is said in our books, that every thing must be pleaded according to its "legal operation" & not, as the case may be, the strict matter of fact. 4 Bac 100. 1 Inst. 113. 6 Inst. 6 Comp. 97. 10 Inst. 642. 60 8 Inst. 258. 6 Inst. 11. 11. 6. 12 Inst. 1 thought, says Sir Edw Black, this rule was wrongly engrafted, & never found an authority in support of my opinion. Thus it is said, if one joint tenant should enfeoff another, this must be pleaded as a release, not as a feoffment, since one joint tenant cannot enfeoff another. So if a grant is made by a Tenant for life, to the reversioner, this must be pleaded as a surrender, because it can not arise as a grant. Or if one should covenant "never to sue his debt", the proper mode of pleading this is as a release or discharge, not as a covenant. Now all these things may be.

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This pleaded, and it is the most proper way, but it is not absolutely necessary that it should be so pleaded. As in the case of the joint warrant, the law considers the feoffment as a release. Consequently the evidence of a feoffment will support the averment of a release, though not therefore the feoffment be pleaded as a feoffment? Cannot the court discover it when on the record as well as they can when off the record?

In the 276. 136. 11. the rule is laid down as it ought to be by Justice Wilmost; it may be, be pleaded as a strict matter of fact or according to its legal operation.

6th Rule. That which appears on the record need not be averred. This is another general rule. However material the fact may be, if it appears on the record, the pleader need not aver it. 1 Inst. 303. 308. 9 Co. 54 a¹⁶; 7 Co. 4. 11. 60. 25². 2 Rowl. 247. 4 Bac. 7. or 2. 2 New R. 77.

As if the fact appears by the other party's own showing. It is entirely useless to plead except for the purpose of showing some fact, which does not appear.

The all necessary circumstances implied on the facts stated need not be specifically alleged. If the averment of one fact implies the existence of another, the latter need not be averred; if it only furnishes evidence of an other fact, this latter of course ought to be specifically alleged. Thus in pleading a feoffment, it is not necessary to aver that livery of seisin was given upon the feoffment, for the word "feoffment," ex vi termini implies livery of seisin. There are some opinions given that this could be done when it occurred only by verdict. Sims 48. 1 Inst. 303 b.

Pleads and pleadings. General rules.

Whatever is admitted between the parties in the pleadings cannot afterwards be contradicted. Even the verdict of a jury cannot contradict it. Neither of the parties can retract what he has pleaded, tho' the law in its discretion may allow the party to correct an error in his plea. The province of a jury is to find those facts only, which are avowed on one side & disputed on the other, or in other words, those facts, about which the parties dispute, or in which they do not agree. B. A. 9289. 4 Bac 2.

* 7th Rule. It is a general rule that each party is bound to prove no other than material averments. This is not however universal. The pleader is bound, in some cases, to prove averments which are immaterial. This however he is required to do only in those cases in which proving the case differently would work a variance, i.e. where the immaterial averments go into the description of the ground of action or matter of defence, the party is bound to prove the averments as stated, altho' many of them are immaterial.

The rule is more ^{said to be} restrained to pleas of record & written contracts. If on pleading a record or written contract the pleader will state any immaterial thing as a part of the cause of action or grounds of defence, and he cannot prove the immaterial fact as stated, his declaration or plea must fail. Dong, b. 40. o. 2. Bl. R. 1104. 28 East 49. 446. Same 48.

You will find two cases decided as late as S. C. 1865, in which this doctrine is laid down, not confined to records or written contracts, but in a note to the first of these cases, the rule is restrained as laid down above. 3 S. T. 18. 4465. Eng. 10. 31. 33

The rule is as above, it is however only ^{one} of ^{two} things to be noted. (See Supplement p. 1) (1st. The rule is restrained to records & express contracts)

Pleads and pleadings. General rules.

him to prove imputinent allegations, i.e. such as are foreign to the subject of pleading. As if the plff should declare that, the Dfnd. entered into a Bond, & at the same time he "wore a white hat," the latter is an imputinent averment and he is not bound to prove it. Bul. N. P. 5.

Lecture III.

If the declaration, the plea, or any other pleading on either part, wants necessary form, or omits the circumstances of time, place &c. it is regularly aided by the adverse party's pleading over, instead of demurring, i.e. if he neglects to demur, & pleads over he cannot take advantage of the defect afterwards, for where the pleading is faulty in no other respect but this, advantage can be taken of it only by special demurrer. Thus if the fault be duplicity, the Dfnd. pleads the Tm. issue, the dñd. cannot take advantage of the duplicity. So where there is a party who pleads a record or deed & omits to take a "proposit" of it, still if the adverse party pleads over instead of demurring the fault is aided. Indeed it is a general rule that a defect merely formal is aided by the party's pleading over. 1 Co. 25. 8 Co. 120. Inst. 303. Cart. 64. Salk. 519. 2. vint. 9. 2. 4. Back.

The principle on which this depends is that of a waiver. If in such case the adverse party does not take advantage of the defect in the manner pointed out by Law he waives all the advantage he might have taken advantage to the informality.

If the pleading on one side is ever so materially defective, i.e. omit material facts, still if the other party avers himself of this material fact omitted by his adverse party, the pleadings will be aided. Thus if the plaintiff has

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were a material fact omitted in the declaration, the declaration is void by it. So if the application was a material fact omitted in the plea in bar, the plea in bar will be good, for in this case there will be upon the whole record a cause of action where the defect is in the declaration. And altho it does not appear in the proper place, or is pleaded by the proper parties, still the defect is cured. Thus the plff. charges the Df. with carrying away "quondam hamum", not stating stating he had given the possession of it, on the night of propensity in it. The Dfend. in his plea in bar admits he took the ham from the property of the plff. & then proceeds to justify it. This cures the declaration, which would otherwise have been bad on the score of s. 1 Bac 197. 1 Fed. 184. locam. 2d. Reader, 6. 85. C. 237.

But with substantial defects, no party can aid his adversary by replying over instead of denying. They cannot be cured in any manner.

Any new matter alledged in any stage of the pleading after the Declaration, must conclude with a "verification". The form of a verification is this, "and this is ready to verify the. The reason why this must be done is, that a verification is the established form or mode of leaving the pleadings open to further reply, for you will observe from what has been said, that the Dfend. in fact has three ways of meeting new matter, first by denying it, secondly by confessing & avoiding it, and thirdly by concurring to it. But if the party has closed his pleadings, the new matter could not be denied, which would be contrary to the rules of pleading because

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where the party advances new matter, he cannot make an issue & compel the other party to join him in it. So it is true the verification is the established form, yet it is a thing absolutely necessary that the party may meet the allegation of his adversary as he wishes. 3 Bl. 309. 18.
Aug 5. 8. Corp. 575. 3 Burr. 772. An except. Burdams 115. 145. 224. 227.

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18. 22

An Estate in "fee simple" may be pleaded or alledged generally; the party is not bound to show the commencement of his estate. But in pleading any particular estate, the pleader must show the creation or commencement of it, that is, he must plead it specially. I have found a reason for this in one Book only (viz. 3 Will. 2.). It is here said a fee may be acquired by acts of ownership, or long possession, even by doing wrong; but the party ought not to plead his own wrong to show his title; of course the jury are competent judges of the mode, in which the Estate was created; but they are not competent judges of a limitation or any other particular estate, for the Court is to judge of the matter of law raised out of the particular mode of the conveyance of the Estate. 2 D. Ray. 333. 24. (See Supplement Note f.)

I have anticipated the rule, that in every stage of the pleadings, each party may meet the allegations of his adversary in one of three ways, viz.

1. By denying them offhanding the 1st. issue; 2. By confessing & avoiding them by some new matter. 3. By returning to them.

This may be done through all the pleadings till a proper issue is tendered & then the other party is bound to join in the issue. 3 Bl. 309. 10. 24. 14. 3. 7. 150. 8. He has no longer

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an election. When the defendant pleads in bar, the plaintiff may deny the facts stated there, or he may confess and avoid it, or he may demur to it. He who pleads must in all cases make a concession with an reservation & not to the question. The pleadings are in the following order; the first plea is in the name of the plaintiff is called the "Declaration". 2. The defendant's answer as a "Special plea in bar". 3. The replication of the plaintiff. 4. The "Rejoinder" of the plaintiff. 5. The "Surreyoinder" of the plaintiff. 6. The "Recutter" of the defendant, and 7. The "Surrecutter" of the plaintiff. The chain of special pleadings can be carried further than a surrecutter. Why in the nature of things it cannot be done is not evident?

One thing material is to be observed respecting the succession of pleadings. In every successive stage of the pleadings, the pleader on each side must support what he has before alleged in his own favor. The plea in bar is to destroy the Declaration. The proper office of the replication is to controvert the plea in bar as to fortify the declaration, & so on thro' all the pleadings; and if this is not the case the party pleading is guilty of a variance or disjunction. 1. leading. 3 B.C. 310. 4. 3 ad. b. 1 Inst. 304. How? 20. 37th Inst. 4 Ray p 14298. 5 Com. 2. 123. 1 Inst. 304.

In concluding these general rules, I would observe that the judgment given by the court is always rendered upon the whole record. So that he who upon the face of the whole record taken together, is not entitled to judgment, must have it. And the court is the court are to give judgment upon the first substantial defect in the pleadings. That if the declaration should be bad & the plea

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in Bar bad, & the p^tff^s should demur to the plea in bar as bad, the court would look back to the first defect, & they would find it in the declarations; the bad plea in bar is good enough for a bad declaration, for the D^f need not have made any answer to the declaration. Suppose the declaration good, the plea in bar bad, & the application bad. Then the p^tff^s demurs, here the first error is in the plea in bar, therefore judgment must be rendered for the p^tff^s because a bad application is good enough for a bad plea in bar. This rule may be applied through all the successive stages of the pleadings. Co^t 199. S^t 60th W.
8 Co^t 120. C^t 133. 2. 4 Co^t 110. folio 123. 4 Bac^t 131.

There are all the general rules proposed to lay down. It now becomes necessary to attend to the several branches of pleading in their order, and first.....

The Declaration.

And first I will speak of the declaration which is the first stage in the pleadings. The declaration must show all that is necessary or essential to the p^tff^s right of action. This is the most general rule. The declaration contains the whole foundation of the p^tff^s claim. Now if the claim is stated in the declaration it cannot be enforced. Indeed it is said to be a reason for this rule that the p^tff^s cannot prove any material fact not alleged. This is not a reason but I think it is rather a consequence of the rule. The reason is, the p^tff^s cannot recover unless he shows a right of recovery. The evidence of this right is contained only in the declaration. The p^tff^s cannot prove a good right of action under a bad declaration. Inst^t 17. a. Plow. 3. 84. 86 Co^t 199. Lant^t 68. 4 Bus^t 4 and 6. 13.

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And as on the other hand the plff. cannot recover unless the declaration shews all that is essential to his right of recovery, so neither, if the declaration being otherwise sufficient, discourses any fact which sheweth he has not a right of recovery, he cannot a fortiori recover. For the same reason also if the declaration discloses any facts which shew that at the commencement of the suit, the right of action was not consummated he cannot recover. Cro C. 325. Cro I. 574. Comp 554. Doug 61. 7 T.R. 4.

Thus if the plff. should declare on a Bond, to pay him his Declaration should shew that the Bond was not due till tomorrow he could not recover upon it, since his cause of action must exist at the date of the writ. And the Declaration is so radically defective that it cannot be cured in any manner.

Yet it is very improper to say, the writ abates in such case; for that is an appropriate term applying particularly to another part of the pleadings.

The rule mentioned above admits of an exception. The rule is, no man can recover in an action on a contract before the time of performing the contract has elapsed. The exception is this where one party is bound to perform a contract in future, and disallows himself to perform it before the time of performance arrives, he may be sued immediately after the act of disability. Thus if A. covenants to convey Lands to B. within 6 months and at the end of 1 month conveys the specific lands to a third person for a year or aye, he may be sued before the 6 m^s have expired. He may to be sure repudiate these again before

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the 6 month have expired, but this is not to be presumed.

So if a Tiffsea for years covenants that he will at the end of his term leave the timber trees standing & this is the strict time of performance of the covenant; now if he cuts them down before the end of the term he may be sued immediately. 5 Co 20. 21. - 2 Sand 397. 7 Co 24. 5. Plow. 84 Cro. I. 574.

* The omission in the Declaration, of anything which is the gist, ground, or substance of the action is an incurable defect.

The gist of the action is the substance of the claim, the essence of the right to recover, it is that without which there is no cause of action. And the declaration may omit the gist of the action without omitting any material fact.

A. will be entitled to a right of recovery against B. by doing some precedent act himself after performance he sees without awaiting performance on his part. There is no cause of action, for tho he has sealed some material facts, viz., a contract, & that he has never been paid, but still the material fact of performance is omitted, and this is sufficient to destroy the declaration.

Again upon the principles of the common law, if a Dog has done an injury to another persons property, the owner is liable if he knew before hand that the Dog was addicted to this species of mischief. Suppose then the action is brought against the owner of the dog stating every thing except the "Scienter"; there is no cause of action. A material fact, which is the gist of the action is omitted, & this is enough. 5 Mod. 305. 4 Blac. 8. —
(See Supplement note g.)

Pla.^s and pleadings.

And in case of such an omission as this, the defect is incurable. The Defendant may demur to it, will be sufficient; or if he pleads to issue & there is a verdict for p^t he may move in arrest of judgment, or have it reversed on a writ of Error. A defect going to the gist of the action is incurable; a verdict will not cure it. 3. Bl. 345. 7 Doug. 658. 4 D. R. 472. 2 H. Bl. 201.

Matter of inducement & matter of aggravation are not the gist of the action. A declaration may consist of, inducement, aggravation & substance. 4 Blac. 500. 2 Blod. 305.

The inducement consists of such subject matter as is merely introductory to the principal fact or cause of action, & is always inserted for the purpose of elucidating & explaining how the cause of action arose.

Matter of aggravation is that which goes to show with what malignity or under what circumstances of outrage or hardship the wrong complained of was committed. 2 Russ. 66. 9. 70.

There are rules applying to these matters which will be given hereafter; but I would here observe that in laying in inducement & matter of aggravation, the Law does not require the same strictness in form, nor the same certainty in description as in stating the cause or ground of action.

Lecture IV.

In all actions the declaration must contain what is called certainty. This certainty is as to parties, time, place and subject matter. All these particulars must be so stated as to be intelligible, that the party may adopt his defense to the real claim of the p^t. This certainty

Pleads and pleadings.

relates chiefly to the mode of making averments, which meaning is that the allegations should not be loose, vague and ambiguous for three reasons, 1^o that the party may be known how & what to answer, 2^o that a certain issue may be joined or joined, and 3^o that the C. may know how to consider judgment. ^{See} Plow. 84. 122. Inst. 303^a. Bro. 78. 5. T. R. 352. 4. Ba. 8.

And it has been decided that the words "said" "aforesaid" do not import sufficient certainty when there are two antecedent subjects to which they are referable, for these words are words of reference. Thus if two counties have been named in the pleader proceeds to name say "the said County" or "the County aforesaid", this wants certainty. This is the case of the subject matter & parties also. Thus in an indictment wherein J. S. was indicted for Burglary and in the reciting part of the declaration another J. S. was named & then the declaration proceeded to state that the said aforesaid J. S. &c. This was held to be uncertain. You might say in the first or last mentioned County aforesaid. At any rate you must use a word of more particularity. 2. Reg. 64a. 66. 2. S. Ray. 888. 83. T. R. 178.

But tho' the declaration contain certainty, the rules are not now near so strict as formerly. As to the subject matter, the rule with respect to a description of it, was very strict but the decisions have not been uniform, and many cases are irreconcileable.

In certain kinds of actions greater certainty is required than in others. As in real actions, and according to the old rule ~~more~~ ones also, greater certainty is required than in injuries to personal chattels; and the reason[#] is supplemental note h.

Hearsay and pleadings.

given is what the Sheriff may know, from the face of the declaration itself, without any extrinsic proof what standards are the subject of the suit, a chose of which he is to give possession. 16055 or 552. Sack 254. 3 Wils 23. 1 Burr 630.

It is detriment more certainly is required than in actions, for it is done to person's chattels. 3 Sir. 303. 12 Mod 3.

and as to the last instance where damages are recovered for injuries to personal chattels the rule is, if the description of the thing be such, that the party can understand according to the common acceptation of language what is meant by the description, it is sufficient to be certain. 2 Gra. 809. Wils 70. 2 Sand 74. 16. 10. 1. 1 Mod 2. 89. 12 Mod 3.

In replevin the rule is less strict than in detriment.
Hardwick 119. 2 Sir. 1615.

In the case of restitution the rule is greatly relaxed. 1 Burr 629.

Where the kind of person's chattel is not specified, the Declaration wants certainty. 4 Burr 2455. 2 Gra. 738. Wils 70. Tolsone 37.

According to the current of modern authorities if the want of certainty in the description of personal chattels in an action for the recovery of damages for injuries done to them goes only to their number, quantity, or quality & not to their general nature or kind the defect is cured by verdict - thus a "parcel of thread" "a library of Books", and "old Iron" are good & sufficient descriptions within verdict in an action of Trover. - And where the thing to be described is mere matter of aggravation much less certainty is required than in things which go to the gist of the action. Indefinite degree of generality in the former, is not objectionable in point of form. 3 Wils. 292. 2 T. R. 292. 2 L. Bl. 555.

Plaintain proceedings.

Plaint's case is 360. 54s. then cannot be Sanc. 150th case
in 2d. Term & Royston ord. 14-10. cannot be 2nd.

The reason why certainty is required is said to be, that unless it is so, the defendant cannot plead it on law to another action for the same cause. This is not the true reason, for it can be pleaded on Sanc. The reason is stated by S.C. Abbott. "It is to be this" that the Def. &c. can be not otherwise justified, or in other words, it is to enable the Plaintiff to discover with clearness the precise thing for which he is sued, so that he may know how to adapt his defense to the plaintiff's claim. 4 Burn. 2456 or 2455.
see sup. note 3

The Law never requires any greater certainty in the description, than the thing will admit. of. 4 Bac. Plad. 125.

If a declaration contains several subject matters, some of which are sufficiently & some not sufficiently described, the declaration will be good, as to those things which are described with sufficient certainty, and for them the plff. may have judgment; or in other words, a declaration may be good in part and bad in part, for want of certainty. Thus in Towns, A. declares that B. took away such & such articles describing them properly, and also "divers others". Now all the articles ascribed are good, but divers others is altogether uncertain & the plff. cannot have judgment for them. The Defendant cannot descend to this Declaration. If he does the Jury give a general verdict and entire damages the plff. cannot have judgment for the court. cannot know for how much to render judgment. The Jury then ought to serve the Bank, if they choose to give any thing for the surplusage, & then the plff. can release the surplusage their judge for the other. 1 Calk. 218. 2 Targ. 379. Com. Pleas. C. 32. L. and 286 n.

Pleading, pleadings.

Where there is a defect in the declaration, and a party cannot regularise it by a plea in abatement. It is not the office of a plea in abatement to attack the proceedings. It reaches the writ only.

If the plea in abatement may be founded on a defect in the declaration; as if there is a misnomer on the declaration, or a variance between the writ and declaration; then there must be a plea in abatement, for there can be no other, yet the effect of a plea in abatement is to destroy the writ.

It is however of the proper mode of attacking an insufficient declaration, tho' when the declaration is the subject of a general demurrer, want of judgment may be raised after verdict. 4 Blac. 8. Salk. 212. 7, 2, 8. With 478 days 172.

In all cases where the common law requires a contract to be written, it is necessary in declaring upon that contract to aver that it is in writing. This if an action is to be brought on a contract of apprenticeship, the party must state that the contract is by deed, for the common law requires that this contract should be by deed. In the case of a sale, this must be averred to be in writing.

So if a contract comes down to the common law, but created by Stat. is required by the Stat. to be in writing, it must be declared upon as in writing.

As in the case of a devise of lands. This is unknown to the common or feudal law. There was no such thing as a testamentary disposition of real property at common law. The Stat. Henr. VIII. creates this right & requires it to be in writing. In declaring on a devise the first requisite of the

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Stat. of Frauds & injuries must be stated, as that it was in writing & subscribed by three witnesses etc.

But a covenant recognized by the Com. Law, and not required to be written, is required to be written by Statute, it is not necessary to declare it to be in writing. This applies to all executory contracts under the Stat. of Frauds & injuries. The reason is, the rules of pleading are rules of com. law settled while these contracts were not required to be in writing. The Stat. does not introduce a new rule of pleading, but a new rule of evidence. Why then, it may be asked, does not the same reason hold in case of a devise before Stat'd? Answer, the distinction is correct, because a devise being unknown to the Common Law, there could be no rule of pleading it established by the Com. Law. The Stat. of Devises creates a new species of common ^{law} ~~law~~, not merely a new rule of evidence. 6 Co 38.12 Mod 540. B. & P. 279.

But still if any of these covenants or agreements, contemplated by the Stat. of Frauds & injuries and by it, are agreed to be in writing, are to be pleaded in Bar, they must be averred to be in writing, because as Justice Bullock says, as he has admitted by his plea in Bar, prima facie, a cause of action on the p'f. he must destroy it, only by a Bar complete in all its parts. B. & P. 279.

In pleading upon a deed or writing the p'f. is not bound to set forth any more of it than is necessary to entitle him to a recovery.

It is commonly the case that contracts contain stipulations on both sides. When there are these distinct stipulations some of which are of no use to the p'f.

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the plff. need not state them in his Declaration. The Defc. may pray upon & take advantage of them if he chooses by way of defense.

This rule however must be understood with some qualification, for if the stipulation is embodied or incorporated with the particular stipulation recited in the Declaration, the plff. must state it, because it goes to make a part of it, either by generalization or exception. And if a covenant to pay a certain sum in work, provided the plff. does thus & thus, shows how the proviso is incorporated with the cause of action and goes to a description of the thing stipulated. There is a promise, a condition precedent & they must both be stated. So where one covenants for quiet enjoyment, & the payment of rent, the rule is the same. This class of cases give the only exception to the general rule. (Diney 64 v.)

It is a general rule in declaring, that where from the facts stated the law will imply a contract, it is necessary for the plff. to raise the promise, or in other words, to aver it. As in indebitatus acceptus, he must state the promise as well as the facts which go to show the foundation of it. * Lams 49. 2. Rose 74. 2 L Ray 1517. Saltk 663.

All Declarations are either,

Federal or of Special.

A general Declaration is one which states the cause of action generally. A special declaration is one which states the cause of action with particularity, or all the special facts. In debitis acceptus, for money had and received is a general declaration, where it does not supplement no. 6.

Plausive pleadings.

state the particular facts, or the special manner in which the promise is to be proved; this if all the facts have been stated, it had would have been a special declaration. 4 Bac. 8.

Where an action is brought on the promissory note or bond without declaring on the conditions, the declaration is unius & is used both in England & in Scotland. 4 Bac. 8. Though the party may declare on the promissory note, & not on the condition too, & show in his declaration that the condition is broken. This however is an unusual way of declaring. It is like what Lord Scott says, "leaping before we get to the stile".

In ejectment of the party merely states that he went in under a lease &c (that is) when he founds upon a title without declining the title, this is general; but if he declines his title, as under a lease, it is a special declaration.

Of the Number of parties in one Declaration.

There are a vast number of cases, which show the particular instances in which the joinder of parties is bad.

Jointure is where a suit is brought in favor of two or more persons, or against two or more defendants.

When two or more persons are jointly interested in a right, they not only may but ought to join in any action which may be brought for its violation. 5 Co 19. 1 Sun. 29. 13 S. 5 Co 18. 5 26 851. 1 Com. 16. Co Litt. 164. 1 Blac. 532. 2 Bl. 696.

And the rule is the same, whether the action is real, personal, or mixed, or whether it sounds in contract or tort. As in the case of joint obligors, or joint tenants. The right is in him or whom the violated right is, so it is on him or whom the violated right is. So co-tenants common or several,

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certain persons, join in one action of trespass, &c. in the case, &c.
There is however a distinction between the case &c. &
Contract of sale, as where the action is brought on a contract,
the non-pecuniary part may be taken advantage of under the general issue, or it may be pleaded in abat-
ement, because the contract promise cannot be the same as that
described in the declaration. 2 Inst. 810. 32 R. 18. 1 Bos. & P. 560. 13 Palk 42. 90. Star. 1146.

Then if a parol promise is made to A. & B. and A. de-
clares upon it alone, he cannot recover in the right of B.
who professes an exclusive remedy of the right. 6 S. R. 766.

But when the action is founded on contract, the non-pecuniary
must be taken advantage of in a plea of abatement, &
not under the general issue. As if A. & B. own a Horse, which
is taken by C. if A. declares for the trespass alone, a
judgment must be rendered. 9 H. 6. 766. Star. 4. 290. Star. 1140. 32 H. 551. 681.

In Palk, one of the cases cited is against the principle,
but that has been questioned, & seems not to be law.

But when a several right is violated, i.e. a right ex-
isted in one person only, another person may not join with
him in a suit for the violation of that right. This would
be a misjoinder of a party in the execution. For the
defendant is liable to the proper person, he is not liable
to a stranger. If A. & B. should sue for a trespass com-
mitted on the case of A. alone, this may be taken ad-
vantage of in a plea of abatement, as the action of invi-
cation seems to be under the gen. issue likewise. But this is not clear.
Bro. Eliz. 143. 1 Dux. 315. 1 Com. L. 13.

If actions by joint tenancies will not join, the one
is under age so that he cannot act, or he has not joined

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the will; may who he has refused the cause. The reason of this is, the right of the Ex. is so strictly joint, that it cannot be several. The rights of two executors are identical. The one of the Execs. may not be compelled to sue, yet he must be named in the suit. Well what is to be done? Why then the suit must be brought jointly and a severance of the Exec.
who will not act, may then be made. Land 291.g. Talc. 3. 46. 37. 26037

But there are rights which cannot be held by two or more jointly, and therefore two or more cannot sue for a violation of them. The right of "personal security" and "personal liberty" never can be joint, tho' the "right of property" may be. In the two former cases there can be no such thing as a jointure of parties.—

If then the same actionable words are spoken of two persons, they cannot join; the right of one's reputation is not the right of the other. The character of each, is his exclusively and no joint right is violated. 4 Bac. 10. L. & C. 5. 12. 13. A. T. 5. E. 5. 504.

I publish a libel of two persons. They cannot join in a suit against me. There is no joint right violated. So if two or more persons are beaten by the same person, they cannot join for the same reason. *Witl. 47. 2 Land 215.

Astotude of the Defendants.

The true rule is this.... If the cause of action arises from a joint act of two parties, they can be sued together. If not, they cannot be joined as co-defendants. Upon this point, as to the reason of the rule, there is nothing said in the books. Evol. 674. cap. 504. B. A. T. 5. 1 Bul. 15.

Suppose then two persons at the same time swear, utter the same blasphemous words, &c. &c. it cannot sue them. (*See supplement N.)

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1

together as defendants on one action. My action or speaking these words is not your act. There is no joint act on the case. 4 Bac. 511. 7 Eliz. 123.

There are cases where persons may be joined, where they unite in the same act; Thus if two persons join in a trespass, they may be sued together; the act of each contributes to give effect to the act of the other. All the acts are considered as one indivisible one. 206. b. 4 Bac. 10. Latch. 262. 2 Burn. 985
27 R. 192.

It's in malicious prosecution, which is a tort also, they may all be joined. Standish however does not stand on the same ground with a malicious prosecution, Standish being a "wrong" merely, while malicious prosecution is a "tort". The fact is, according to Justice Bubbler, every cause of action arising "Ex delicto" is not a "tort"; and he takes this distinction, viz., In every cause of action arising "Ex delicto" there must be some positive act, some degree of violence or force to make it a "tort". Standish arises "Ex delicto" but it is merely a "wrong", there being nothing but words spoken, no positive act committed to make it "a tort". Now in malicious prosecution, there is something more than words spoken, a positive act is here committed. Although Standish is "a wrong" and malicious prosecution "a tort", still they are causes of action of sufficiently the same nature to be joined on the same suit, for they are both actions on the same cause.

So if two join on establishing a Will, they may be sued jointly, for one may write one part, and the other the other part, which suppose a "tort", an act done.

In the case of torts the rule of distinction is this;

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Those acts in which the Law supposes any degree of force, may be committed by two jointly; when this cannot be supposed, it cannot be committed jointly. Sect. 11. &c. V.

In enquiring what parties may be joined in one action, I observed there were certain acts which could not be committed jointly, of course an action for a violation of them cannot be brought.

Further. Two persons can never be joined in one action as defendants, for distinct torts by them committed severally. Thus if A commits a trespass upon B, and B afterwards commits a trespass upon A, of the same nature, he cannot sue them together. Stiles 153. Here the cause of action does not arise from the joint act of both parties. In case of contracts, if there are two or more persons claiming jointly under a contract, of one of them dies, the ^{Ex parte} cause due on the contract abides, the survivor in an action. The contract binds joint the whole remedy, survivors to the survivor. Thus a bona is given to A and B, jointly. Abides the whole right of action ^{sub supplement note.} Survivors to B. 11 Bos & Pol. 445. 1 East 497.

If two or more persons bind themselves by a joint contract, they must all be joined as defendants on the action. Such is not the several contract of either of them; it is one his, or any individual's contract, but their, i.e. the contract of all together. Falk 343. 2 Verm 99. 3. Bach 693. Falk 348.

But if two or more bind themselves jointly severally, each or all may be sued at the plaintiff's election, for it is the act of each, as well as of both or all.

But if three or more bind themselves by a joint several contract, the action may be brought against

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all or one, but it cannot be brought against two; he can not sue more than one unless he sues all, for the contract must be considered as joint or as several. If it is a joint contract, all must be sued. If it is a several contract, only one can be sued. But he can not sue the contract as two thirds joint & the other third several. Per. 24. 1 P. C. 238. 3 v. R. 82. 1 P. C. 291.

And if two or more bind themselves together by one contract, it is joint of course, unless the terms of it imply a several duty or obligation. It is true the word "several" need not be used; other words may be used to show that it is the intention to be bound severally. E.g. If a promissory note is drawn thus "We, Brown" &c. this is a joint obligation. 2 Atk. 31. Chitty 175. 176. 36. 234 5 Bew. 2611.

If A. delivers goods to B. to be delivered over to C. and B. fails to deliver, A. and C. cannot join in an action against him, for though each may have a right of action against B. still it is on different grounds.

This rule is established as it is laid down, but Mr. Poole thinks that C. (in this case) has no right of action whatever, for B. is ^{not} agent, not B. and C. is in no wise privy to the transaction. 1 P. C. 9. 10. 1 Bell. 68. Roard. 321. He supposes that if goods are delivered to B. to deliver to C. that C. must sue on ^{the} ~~the~~ money, then the action must be in d. b. assumps. Chitty 220. 1 Pow. 343. 353.

And as upon a contract which is joint with respect to obligees, where one dies his Exec. or Adm. cannot sue alone or with the survivors; so on the other hand if two persons bind themselves by a joint contract and one dies, his Exec. is not liable to be sued in a suit with the survivor.

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surviving obligor or debtor. At Law he cannot be sued after the death of the survivor. It is the nature of a joint interest and a joint duty to survive entire to the surviving party.

But if two bind themselves by a joint & several obligation, the Exec. or Adm. of the deceased obligor may be sued alone, but he cannot be joined with the surviving obligor. 1 East 400. So if there are two or more joint and several obligors, the representatives of the deceased may sue on the obligation.

As to suits against Execs. the rule is, the action must be brought against all, who have administered; and not against those who have not administered. There may be three Executrices & one refuses, the creditor is to bring his action against the two who have administered. This is different from the rule where Execs. sue. But here no harm is done; he is liable to no costs. But in this last case where they are sued if the Exec. who refuses the trust does not appear, the admt. will go against him, & he will suffer without a possibility of reparation. Besides where Execs. are sued, nobody knows who they are till they have administered; Corn. Abat. 37. 10. 1 Sess. 165. 3d. R. 557. 1 Sanc. 291. g.

Of the joinder of different causes of actions in a suit.

Suits caused may embrace several distinct causes of grounds of action, and others not.

And here the general rule is, that several causes of action being of the same nature, may be joined in one declaration, between the parties. This is fully held in Proby's notes 28 B. he may sue on both of them in one declaration, and this declaration will contain two counts. 4 Wach. Com. b. 24. n. 60. 6. 160. 6. 160.

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By this rule (it is said) is meant, if several causes of action require the same judgment at Com. Law, they may be joined in one declaration. They are said to be "of the same nature" (as is expressed in a former rule) when they require the same judgment at Com. Law. 5 Bac. 194. 1 Bac. 30. 2 Wils. 319. cont. 366.

For the purpose of understanding this rule, it is necessary to know that at Com. Law in all civil actions, there were two kinds of judgments, one a "misericordia" and the other a "capitium pro fine". Under a misericordia the party is not amerced, and his person is not taken to respond the judgment. Under a capitium he is fined, and his body is arrested to pay the fine. In all cases committed "with force" the civil injury is connected with a public wrong and of course the judgment is a capitium. In all cases laid with "force and arms" the judgment is a "capitium"; where it is not laid with force and arms it is a "misericordia"; or in other words where there can be no force presumed, if the plff. has judgment, it is a misericordia. This rule is not universally true, tho' it is generally given in the Books. 120. 11. 252. 107. R. 276. Dong. 85. 2. 1 Helle. 14. 7. 6. 20. 316

It is universally true however, that if several distinct causes of action require the same judgment at Com. Law & the same pleia or general issue, they may all be joined in one Declaration. As when A. has several Bonds against B.; the issue in all is "non est factum"; therefore they may all be declared upon together. So if one has several Covenants by deed, they may all be joined.

If one is entitled to a recovery on several parol, from the issue in all is non agt. & the judge is a misericordia. 1 Wils. 252. 107. R. 276.

Please find proceedings.

And to go further. If one person has committed several trespasses with force, against another, whose trespasses may be joined in one declaration, and so may several actions of trespass, for the judgment is a capiatur and the general issue the same. So several actions of trespass on the case, may be joined in one declaration; and so may several actions of trespass, either with negligence, may be joined, as against a Bailee. Trouser & slander may be joined, and so may slander & malicious prosecution. 3 Co. 7. 8.
2 Bl. C. 66. 848. 1 Wils. 252. 2 Wils. 319. Comyns. 230. 3 East. 70. 10 M. 223.

But these examples of the admissible joinder of causes of action are those where the judgments and the general issues are the same. But where the judgments only are the same, the causes may be joined. This is not universally the case, but it is sometimes. Thus Debt and Detinue may be joined in one declaration. The general issue in debt is "not debt" in Detinue it is "non detinet"; but the judgments are the same, and they both arise "ex contractu". Bailment Bond and debt on simple contract may be joined; but the general issue in the two cases is different. Twifel classes detinue under the head of tort, and was led so to do from the idea that detinue was a tort, and that it was substituted for detinue, but it is improperly classified. 4 Bac. H. Brok. 20. 316. 1 Inst. 366. 1 H. 6. 14. 7.

To exemplify the negative part of the rule. Trespass in contract can never be joined in one declaration; both the general issues of the judgments are different. 1 Bac. 30. 21. 1 Blod. 42.

By the way, I forgot to mention the time when of

Placing in plausibility.

the rule. It would introduce endless confusion into judicial proceedings to join all causes of action in a suit, because there may be often as many different pleads required as causes of action. Suppose a real action is tried there is one general issue; trespass is inserted in the same declaration, here is another general issue &c. The law permits the joinder of several causes of action, where it is convenient, without complicating the advance of Justice.

Trespass, & trespass on the case, arising "ex delicto" cannot be joined in one declaration, because the judgments are different. Neither can case & contract be joined; here the judgments are the same but the pleas are different, and so are the nature of the actions. For even a debt on Bond cannot be joined. The pleas are different.
Bank 211. 5. C. Lloyd 90. 1. Bent 366 et. Ray. 283. S. Ray. 58. 2. Bur. 1114. 2. Wils. 319. 6. 2 H. 189.

It is true, or general however that several actions or causes of action in trespass, or the same in case, or the same on contract may be joined together, yet so each of them in its particular case may be different.

This is not however universally true. There is at least one exception, and I do not know but more; that is, debt and account cannot be joined in one declaration. The action of Account is altogether "sui generis". The general issue is different; the proceedings in the two actions are different. Indeed in account the proceedings are altogether different from any other action at law. Thus, in debt the cause is tried by a jury; in account, the first issue is indeed tried by a jury, but then the cause goes to arbitrators who finally determine it. The judgment

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judgments than are different, for in account there are two judgments.

Can ouster and Assault & battery be joined in one declaration, since the proper action to the first is Ejectment & to the last, trespass *vit et armis*? This question has been much agitated, but Mr. Gould thinks without any good reason, since it is apparent in all the modern reports that the judgment & the pl. are the same in both. Hob. 249.

In Conn. the general issue is not the same in Ejectment as in trespass, yet judgment is the same in both.

It may be observed that the Stat. Edward VI. (5 W^m & Mary) did away the distinction between the judgments in Great Britain; still the difference is kept up between the causes of action as formerly, for the plff. now pays a fine on the nature of a duty when he takes out a writ sounding trespass *vit et armis*.

The distinctions upon this subject are not settled by any general rule. There is very little difficulty arising from it however because examples are so numerous; yet there is no positive rule, except the universal rule which will apply in all cases. And it is a general rule that not an universal one, that where the judgments are the same, and the converse not precisely true, there is no rule that will apply to every case that occurs.

In Conn. Mr. Gould thinks we ought to preserve all the distinctions as in Great Britain.

The distinctions thus appear to be these. 1. When the judgments & pleadings are both the same, there always may be a joinder of different causes of action.

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2nd. Where the judgments are the same, they may generally be joined tho' the pleas are different, but this is not always the case. These are the only two affirmative rules. 3rd. On the other hand, where the judgments are different there never can be a joinder; a fortiori where the judgments & general issue are both diff. there never can be.

The only chasm is in the second affirmative rule; it admits of as many exceptions as the cases coming within it. 3.

Non-joinder of causes of action in one declaration.

The joinder of different causes of action which can not be joined are incurable defects, therefore the plaintiff may demand to the defendant a new trial or judgment.

And here a distinction is to be observed. Misjoiner-
der of parties has been often confounded with dupli-
city in pleading. Misjoinerder to be sure amounts to duplicity,
but it amounts to more than duplicity. Duplicity
is a mere fault or error, and can be only taken advantage
of by special permission. Misjoinerder is an incurable de-
fect. The real distinction is this.

Misjoinerder of actions, consists in joining in one
declaration distinct causes of action, which cannot
be joined as distinct, substantive grounds of recovery.

Duplicity or Pleading consists in inserting causes
of action, which cannot be joined, to enforce one entire,
indivisible right of recovery. The latter is a mere fault.
in form. the former is a radical defect.

If I pose a demand against A, in his first count,
in debt on Bond, and in the second, alleges a Billings.

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here in the nature of things the second cause cannot be inserted for the purpose of enforcing the first cause. Then there are two distinct causes of action inserted for the purpose of enforcing two distinct substantives of course of recovery. This is a misjoinder of actions.

On the other hand, A lends a horse to B. he brings an action upon this bondment, stating the contract as trespass implied, and then avers that the defendant abused the horse wickedly maliciously. Now this abuse sounds in tort, still he declares first upon a contract. This declaration is double. He charges him with a wrong. This however is all brought to enforce one right of recovery. Then there is duplicity in pleading.

Trespass and trespass on the case, ex delicto, cannot be joined; yet it seems that a declaration on trespass, breaking his house, destroying his goods, & beating his servant, "per quod servitium amicit," is good. In the first place you will perceive this is all one continued trespass; but this is another reason, according to the English form of proceeding, in action for goods received, amicit is usually accompanied with trespass with force, tho they are substantially different, yet the per quod is rather a matter of aggravation than anything else. It should go on principle farther than this. It is strictly proper to join without saying a per quod, because the beating will be considered a mere matter of aggravation as to the original trespass. This may be questioned. 4 Banch. 2. C. 6. 313. 5. 8. 6. 34. 1. T. v. W. Price ab. q. East 388. Court 113. 3 T. C. 30. 2. 176. 36. 555. 2. 7. 6. 167. Stiles 4. 3. 202. Stra 43. 20. 1. Dack 10. 84. 2. Esp 29. 407. 3. Will 20. 156. 116. 535. 108. 6. Will 4. 86.

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When several actions are brought for several things of the same nature, the court before which they are tried, may, in any case, join or consolidation of them; i.e. may compile a joinder of them in one Declaration in several Courts. This is mere matter of discretion. It is done, when done at all, for the purpose of saving long vexation. This supposes that there are two actions on notes of hand agt. B. the plaintiff may compel A. to drop one suit & join both in one, ^{if he is to pay the costs, for the sake of saving vexation} declaration in two Courts. Tell an affidavit that there are several defences, so that the trial would be anticipated by all being joined, will induce the court from compelling a consolidation of them. ^{Comb. 244. 2. Pla. 114. 9. 167. 8. 2. 5. 0. 639. Con. III.}

Miscellaneous rules respecting Declarations.

The Declaration should always agree with Schedule VII. the writ. The writ is the formulation of all the proceedings; since it is that which gives the court authority to hear the cause. If John of Bradford, is called in the writ to answer in his behalf and in the declaration is called to answer to himself on the cause (without an "in the name") the answer is fatal. ^{Book. I. P. d. 84. loco b. 325. H. 6. 180. 177. - 4. 13ac. 19. 18.}

When the plaintiff's right of action is to accrue by the performance of some conditions precedent on his part, he must aver performance of that condition on his part in his declaration. The omission of this is an incurable defect and cannot be cured by a verdict, because it goes to the gist of the action. The plaintiff discloses in his own declaration that he has no right of recovery. ^{Black Laming v. St. L. & W. R. 12. 265. co. 2. 265. co.} subject of precedent & subsequent conditions on H. R. 638. in the case of Holman v. ^{1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 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But there is a material distinction to be observed with respect to the rule of pleading, where there is a condition precedent, & a condition subsequent. For where the party's right of action is qualified by a condition subsequent he is not bound to take notice of the condition. It is matter of defense merely and must be plead by the defendant. The right of action does not accrue by the performance of the condition. 7 Co. 10. 13. R. 638. 7 Co. 12. 300. 14 Co. 254. 20. 574. 4 T. R. 65.

So also if there are in one contract reciprocal, i.e. independent, covenants or promises, the plaintiff need not aver performance of the covenants or promises on his part. This is directly contrary where the covenants are dependent, for then he who sues must aver performance of the covenant or promise on his part. Bro. 1. 645. Com. 6. 265. 7 Co. 6. 88. 10 Dow. 6. 359. 2. Mo. 309. 3 Co. 10. 18. 617.
In the former case it is covenant for covenant, or promise for promise. The one is in consideration of the other. & covenants in consideration of the covenants of B. in the same declaration, and B. covenants in consideration of the covenants of A. in the same declaration.

But suppose A. & B. enter into mutual stipulations so that A. covenants in consideration of B. performing his covenants, and B. in consideration of A. performing his own covenants which have been the other must aver that he himself has performed, or has tendered performance.

These facts, which constitute the gist or substance of the action, must be expressly and positively alleged, not by way of recital. As in this case. Therefore we see where the party says "whereas the party aforesaid did this day do" &c. &c. "whereas he did not" &c. &c. 22. 97. 2. 3. Ch. 43. 3. Esp. 25. 3. 6. 2. 3. 6. 1. 6. 6. 4. 9. 9. 2. 20. 203. 2. 2. 4. 3. 4. 6. 6. 5. 7. 6. 303. Bro. 9. 361.

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Formerly it was holden that an amendment of this kind, was a radical defect, and not cured by verdict. Stake this not now to be law. It is certainly good after verdict, and the general ~~opin~~ opinion is, that it is bad only on special Grounds, and is not the subject of a general demurrer. The old cases on pleath. are much more strict, than the modern ones.

But this rule does not hold as to such facts as are not traversable by plea, however essential they may be, and this inference I make from the established form of pleading in a great variety of cases. An assumption, it is the usualliest best form of pleading, that the consideration is stated in a way of recital, and not by direct avowal. The consideration in assumption, cannot be traversed by plea, because it would amount to the general issue. To insist upon ~~possession~~ possession is the gist of the action. But the ple. never need state that he was possessed of such goods; he may state that "I have &c" and this is not traversable by plea. Stake it to be clear then that the rule does not hold as to such facts, however material which are not traversable by plea. They need not be stated directly or positively. 2 Inst 5. 13. 4 Co 18. 6 10 Co 77. 2d Co after 10 t. Cib 116. 15 and 169. 70 and 2.

How does the general rule hold as to mere matters of inaccuracy (and by the way they are not on themselves of the essence of the action). The rule does not in its terms extend to inaccuracy, ^{other than not traversable} 4 Bac 13. 19. (Op. 177. 46. 127.)

The subject of the suit must be described in the declaration with certainty. See rules above with regard to certainty in pleading.

It is said to be sufficient if the party can know what is

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meant. Thus in Eng. the ends and bounds of a field are not described as in Conn., but only the place where it lies.

It has also been held that "mow brought for 'ships and sails'" was a sufficient description; the mow brought for "some fish," or "for some pieces of linen" was held bad. But for a "library of books" it was held a sufficient description. But this is quite too loose & vague. The decisions are somewhat arbitrary.

If the declaration is good in part and ill in part, it is not for this cause demarable. The plff may recover for that part which is good. Thus if the plff sue on two bonds and it appears on the face of the declaration that one is not payable, or that it is void, the declaration is not demarable, for if he can recover on either of the counts, that count is good, and on it he is entitled to judgment. ^{128d 286}
Book 128. 1 Recd 284. 5. 16. 6. 115. 8. ^{128d 287} Recd 395. Yelb. 45. 47. Recd 395. ^{128d 288} Recd 104. 128d 286. 45.

This rule however seems to me in its nature to be confined to those cases where there is one entire cause of action, &c. &c. &c. &c. For if the Declaration is ill in one part, when all the parts make but one cause of action, the declaration is demarable, for all the parts except mere surplusage are necessary to constitute one ground of action. The declaration is ill as to entire cause of action.

Two there are distinct demands in one declaration one of which is good, and the other ill, the first declaration is not demarable, yet if the plff obtain a general verdict and one demand goes, judgment must be arrested. Thus in an action for Slander, for two distinct sorts of words, one part is bad and verdict is found

Please see folio 115 verso.

entire, judgment must be arrested, for the Court cannot determine how much was given on other La boyaours t.
B.C. 7.8.1060.30.366117.2 Burr 985. 226. 8C. 318. 1st. 6508. 532. Taek 384. 532. nob. 178. 1805. 17. 30014

Now here it is necessary to explain not only the true reason of this, but the distinction between this and common cases of arrest of judgment. You know it is a general rule of pleading what every defense which will support a motion in arrest of judgment will support a general demurrer. But here a case of judgment takes place and yet the declaration is not the subject of a general demurrer. Now is this case reconcilable? The answer is easy - The rule above can do no violence to insufficiency in the proceedings. There is no such insufficiency in the present case. The declaration is 9000. The insufficiency is created by the verdict. It is arrests for defect in the verdict. There is then no difficulty in reconciling the cases.

You perceive then according to the true spirit of the rule, whether the Ct. can determine after verdict from the face of the record the precise amount of each distinct claim and, judgment will not be arrested, al- tho there is one bad count. Hob. 178. 8C. 317. Please C. 32. 8. 36. 325. q. 3.

If the Party should assess greater damages than the pif. demands, this will not of course destroy the declaration or ac- tion. In that case the pif. may release the surplus, and the judgment for the residue - or the court without a release may give judgment for the sum demanded. The Party are not authorized to give more than the pif. demands, for the pif. has not been called to answer to more than a certain amount, exorbitant though this may be, ordered by the Ct. Stein 354. 4. 180. 220. 2. Rule 232. F. & T. B. 107. 76 and 88. Moore 8. 1060. 15. 2. 180. 223.

Pleadings and pleadings.

The rule is the sume if the p^t. demands more than by his own showing he is entitled to, if the jury give more than he is thus entitled to. Then he may release the excess and take judgment for the residue. This may often happen in actions on contracts. The rule of damages on Bonds is the sume and interest. The jury can give no more. If then the p^t. demands more than this and the Jury gives it, he may remit the excess, or the Lt. may do it, of course. 1 R. ab. 785. 4 Bac 26. Ep. 304. 2 T.R. 113. 123. 6 Edw. 75.

A declaration may be cured by a plea in bar, even if it is faulty in substance. This was treated of before under the general rule of Pleading. Com. Sec. Pleas. 6. 85.

We now come to treat of the pleadings, which follow the Declaration. These consist of those allegations which the Defendant makes by way of defense, and those which the Plaintiff makes by way of answer to the Defendants defense.

Pleads are of two kinds,

Military pleads.

and...

Plead to the action.

Military Pleads.

Military pleads are used, for the more, instead of depositions, & filed without any foundation in truth or falsehood of an issue in fact was taken on them it went to the Jury.

This now by the Stat. 4 and 5. Ann. no deposition can be admitted without an affidavit of its truth or some circumstance smaller to induce the Court to believe it to be true. And this affidavit is made under the pains & penalties of perjury. 3 Bl. 303. 36. 351. 4 Bac 85. and 51. 1 Com. 26.

Pleading, pleadings.

In Town we have no such Stat. as this, and have
no need of any; because, pleading a false plea here w^t
answers no purpose, because it could not, of course, pro-
cure an imparlance.

Our Stat. requires that all dilatory pleas shall
be tried at the common sessional. of the term, of course
it can procure no delay. And as on the L. P. they are
to be given in, heard and determined within three days
after the commencement of the Term.

These dilatory pleas are subdivided into three kinds...
I shall pursue the division of Blackstone. It is the
most simple & best calculated to give a just idea of
the subject. They are I. Pleas to the Jurisdiction of
the Court, II. Pleas to the disability of the plaintiff
and III. Pleas in Abatement. & these in their order, are
4. Of Pleas to the Jurisdiction of the Court.

The causes of this plea are various. It is a ground of ob-
jection to the jurisdiction of a Court of limited jurisdi-
ction that the cause arose out of the local limits of that
Court. This rule in Com. ap[plies] only to the Cts. of incorporated Cities. Branch. 1³⁵⁴ Bac 5. 388la. 301. Salt 544. 160n 3. 2 Butterw^y.

So also if the defendant has any privilege by which he
is not bound liable to be sued in a particular Court,
or any other than a particular Court. If then he is
sued in any other, this plea may be put in. This has
been considered as a plea to the person, but it is not.
It is the cause of Attorney. Where the Court of which the
Att^y is an officer has no cognizance of the subject mat-
ter, he may be prosecuted before any other Court. So this

"Pleadings.

a plea to the jurisdiction or to the person? Clearly to the former. The plea is, "I am an officer of another court, therefore this court has no cognizance of my person. I am not bound to answer your complaint here".

In Com. there is no such privilege.

This privilege of Attorneys holds only in actions brought ag. them in their own right, and not, "in autre droit". Thus, if an action is brought ag. an Atty. he is suable just as any other citizen is. He is sued in right of his testator, and he cannot communicate his privilege to the executors of his Testator. 4 Bac 36. 7. Cro L. 585, d'Alb. 2. 1608. 17.

So if he is sued with another who has not the privilege, he loses his privilege. This privilege is not communicable. His co-Defend. is liable of so must be he.

3. Another ground of exception to the jurisdiction of the Court, is the want of cognizance of the "subject matter" of the suit. Thus, if a person is indicted for murder in the Court of C. & E. he may plead to the jurisdiction of that court; or when one is sued in a real action in B.C., the same plea may be used. It is to be observed, the Defend. need not plead, in this case, to the jurisdiction of the Court, for the proceedings (if any are had) are "contra non judicem" and therefore void. If therefore the Court act, in such cases, they act "extra iurisdictionem". 4 Bac 35. 10 Co 688. 2 Inst. 833. East 252.

When there is a want of jurisdiction arising from some personal privilege of the Defend. or the cause of action arises out of the local limits of the Court, the Atty. must plead it, or he waives it; where the subject matter is not cognizable by the Court, it must be plead.

Pleads and pleadings.

for the Court are bound "ex officio" to notice it. (vide title of "false imprisonment" for authorities.)

Actually no action whatever [Lecture VIII.] could be tried, except in the County where the action arose. This is not now the case as to Courts of a general Jurisdiction. It is therefore no ground of exception to a Court of General jurisdiction that the cause of action (where the action is transitory) arose in a foreign Country. The forms of pleading correspond indeed with the old strict rule of the Com. Law, and the cause of action is alledged to have arisen in the County, but a "videlicet" is always inserted. This obtains only in transitory actions.

But as to local actions it is otherwise. Thence where the judgment at Law acts in rem, it is impossible for the Court to try it, if the subject is in another County. As in ejectment. The rule is the same also in criminal cases. The Penal Laws of every Sovereign State are strictly local; of course the cause of action is strictly local.* Coop. 161. 175. 181. 2. 2d Bl. 145. 161. 2. 176. 130. 146⁴ Laws 74 (July 25. 1802) &c.

Personal actions are generally transitory, and mixed actions are local. The first follow the person of the parties.

Subject to the jurisdiction is regularly the first plea in the order of pleading on the part of the Defendant; for the exception when necessary to be taken by plea is waived by any other plea. If there is a case where a want of jurisdiction might be pleaded, another plea is put in, he submits to the jurisdiction. Inst. 127. 160. 164. 4 Bac. 7. 28. 184. 35. 1 Bon. 5. 6. 2d. 172. 6.

But there are cases where the Defendant cannot give jurisdiction.
* See Supplement m.

Pleas and pleadings.

jurisdiction; and there are where the Ct. have not cognizance of the subject matter, & also in local actions.

According to the English practice, a plea to the jurisdiction is always to be signed by the party himself, and not by his attorney; because if done by an attorney it is supposed to be done by leave of the Court, & asking leave acknowledging jurisdiction of the Ct. All other pleas are regularly signed by the Atty, 6 Mod 146. Barnes 190. 3 Bla. 303. 4 Bac. 35.)

In Conn. we do not make this distinction. The Atty, signs this as well as any other plea. The rule is somewhat artificial & can be of no use.

This plea concludes to the cognizance of the suit, by praying judgment whether the Ct. will have further cognizance of the suit. The form is - "And the said A. B. prays judgment whether etc." - 3 Bla. 303. Saltk 298. Sims 109. Smith 363.

In Conn. where an action is dismissed on a plea to the jurisdiction, costs are taxed in favor of the Plaintiff. When it is dismissed by the Ct. "ex officio", no costs are given.

It seems to be questionable whether the Court can render judgment for costs, where it has no jurisdiction of the suit. It has no right to render judgment except for that which is indispensably necessary. This practice, I believe says Mr. Gould, is indefensible. It is said the allowance of costs is intended to prevent the Plaintiff from suing the pleit. for malicious prosecution. But this cannot be effected. The costs taxed are not a rule of damages, nor are they an actual indemnification. Besides the Plaintiff ought to have a right to have his costs taxed by a Jury.

To far of pleas to the jurisdiction -

Pleads and pleadings.

III. Of Pleads to the disability of the Plaintiff.

The grounds of the plead are various, especially in England.

1st. Outlawry, of the plff. is a good plea to his disability. This is a title unknown to our law. It is practised upon however in the State of New York.

The outlawry of the plff. whilst revives or, pardon obtained is a good plea to the disability, because the outlaw is so far out of the protection of the law, that he cannot enforce his rights in a Court of Justice. 1 Bac 2. 4 Bac. 35. 1 Com. 6. 3.
3 Bac 762. Litt. 197. 6o dit. 128^o.

This is not however an actual abatement of the suit. It is only a temporary impediment, for when a pardon is obtained, or the outlawry is reversed, he may be called to answer in the same suit, if the cause of action is still remaining. 4 Bac. 35. Laws. 102. 3.

This disability belongs only to those suits brought in his own right, and not to those brought in the right of another. As if he sees Justice. It is no objection that he is an outlaw. The outlawry is intended as a punishment for him. But if it might be plead to an action brought by him as Cee. The punishment would fall upon the creditors or representatives of an innocent man. 3 Bac 762. 1. 102. 128^o.

But in actions broug^t by exec^t or Adm. the outlawry of the deceased testator or intestate may be pleaded, for here the disability goes to the person whose right is to be enforced. The testator could not transmit to another the right to prosecute a claim, which he himself could not enforce. 1 Com. 6. 5. 6. Litt. 1604. 1605. 5. 8

But thoⁿ an outlaw cannot bring an action on his

Pleas and pleadings.

own right, he may be sued as any other person. The outlawry is intended to deprive him of his civil rights, and not to furnish him with an immunity. 3 Bac. 761. 1 Sid. 60. May 1.

This disability is always pleadable as a dilatory plea, and sometimes may be pleaded in Bar. The rule of discrimination is this - when the cause of action is forfeited by the outlawry, the disability may be pleaded in Bar, as well as a dilatory plea. &c. in Felony where the action concerns his goods, chattels, lands or tenements; for they are all forfeited by the outlawry. On the other hand, where the cause of action is not forfeited by the outlawry, the objection can be taken on by way of dilatory plea, and this is always the case where the damages are presumptive, as in Glander, malicious prosecution &c. because these causes of action cannot be forfeited; they are unalienable; and even where the damages are not presumptive, if the action concerns property of the property is not forfeited, the disability can be pleaded only as a dilatory plea. 1 Bac. 14. 3 D. 761. 5 Co. 109. 1 Inst. 29. 128. 6 Co. 29. Dyer 223. Lawes 38. 104

2nd. Excommunication. This is a second ground of pleading to the disability in Eng. This prevents the defendant from suing in his own or in another's right; as he is supposed to be unqualified to dispose of goods, in "pious uses" which was formerly done by Eccles. & Admir. And this rule holds now in G. B. This plea does not abate the writ, but merely discharges the Defendant, since it is liable to answer to the same writ when absolution is obtained. 1 H. Bac. 3. 4 Bac. 24. 7. D. 319. Coke 883. 6 Co. 61. 133. 4. 6 Co. 63. 4 Bl. 303.

Absolution is the only good replication to this plea.

Pleads and pleadings.

Here again we see how dilatory pleads differ from pleads in Abatement. 2 Bac 320. 820. 8. Co. 2d. 133. 4.

This species of disability is unknown in the U. States.
3rd. Alienage. A third ground of pleading to
the disability of the p^tff. is alienage. This is sometimes
pleadable to the disability, but not in all cases. For
the purpose of considering the subject we must look at
the distinctions on the subject of aliens.

An alien friend if not naturalized or made a den-
izen can maintain no action real or mixed. But an
alien friend may maintain personal actions. The
reason of the former rule is, he cannot hold Land. The
policy of the Com. Law is such that he cannot, but ev-
ery real action is for the recovery of Lands. As he can-
not hold Lands therefore he cannot recover them. But
an alien friend may hold personal property, there-
fore he may maintain an action for it. In actions how-
ever real or mixed, it is a good ground of defence, that the
p^tff. is an alien. In personal actions it is not so. Comp.
171. 3. Bl. 384. 1. Sac 4th. 276. 162. 2 Stra. 1082. or 10. 82. Col. C. 371.

In Kirby 413. a strange decision. Not Law however.
The distinctions now taken relate to an alien friend.

On the other hand it is a general rule that an ali-
ien enemy can maintain no action whatever, either
real, personal or mixed. An alien enemy unless a pris-
oner of war can hardly be in a situation to bring an
action. But a prisoner of war can maintain no ac-
tion generally before Courts acting under authority of
that Government, which holds him a prisoner. By this
& see Supplement note M.

Matters and proceedings.

you will not understand that the personal rights of a prisoner are destroyed. No, the public will punish one who violates his rights. The reason of the rule is founded on a State policy, because the recovery of their debts tends to strengthen their adversaries, and enlarge their resources. Stra 1082. 1 Bos. & Pul 163. 6 T.R. 23. 49.
Douz 626. or 649.

There is an exception to the rule of an alien enemy; for he may maintain an action on a ransom, even who has been made a prisoner with his hostage, & this under the Law of Nations, recognized by the municipal regulations of every Government. Indeed if this were not so, their ransoms never could take place. Good faith and honesty between sovereign States wd. be done away.

A celebrated and interesting case is reported in Cope 161, where it was controverted, that no recovery ought to be had, because the alien enemy, who brought the action was a party to a war. That the hostage & ransom bills were both in relation & therefore no longer in the enemies property. But Sd. Mansfield in a learned argument overrules every objection & decides in favor of the alien Enemy. Douz 619. Cope 163 Bux. 1734.

So also an alien enemy, residing in a nation at war with his own under a licence protection or safe conduct, from his own, may maintain several actions. But in this case he is not an alien enemy, quoad hoc he is a member of the State and an alien friend. L. Roay 282. Salby 46. Stra 1082. 8 T.R. 6. 166. 15.

Whether an alien enemy not residing under a licence protection of our, maintain an action in right of another as exec. or Adm. seems to be doubtful. The point

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has never been judicially settled. Reasons of policy are against it, and reasons of justice are greatly in favor of it. Sometimes the former reasons are also in favor of it, for the effects may belong to the Subjects of the Country where the action is brought. An alien friend may hold lands as Exec: but in his own right he cannot of course, if he bring an action as Exec: to recover a leasehold, his alienage is not pleadable to his disability. *Crol. 508.*
1 Blac. 84. *6 Cr. 2. 142.* *683.*

4th. Premunire, Popish recusancy, attaint of Felony and being a Man to professsed are all disabilities in Eng: but as they are unknown in our Law nothing will be said of them. *3 Bla. 301.* *1 C. & J. 4.* *7 Blac. 36.* *143.* *4 Blc. 380.*

In some of United States there is however, attaint for treason & felony, but it is not certain that in those States this is a disability. At any rate it can be of no consequence to us.

5th. Coverlure. Another ground of pleading to the disability of the plff. is coverlure. This happens where a poor coverlure sues alone without her Husband, the deft. may plead to the disability & defeat the suit. The distinctions on this subject are all to be found under the title "Baron & Feme." *4 Blac. 39.* *160* *Sit 132.* *1 Bla. 4434.*

I would merely observe the husband must always be a party to the suit, where it is used to enforce a right of his own. True there are exceptions, as where the husband is civiter mortuus. The reasons of this are given in our another Title. *3 & 16. 681.* *Law 6105.*

The coverlure of the wife is pleadable only as a ^{defence} ~~defence~~

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dilatory plea. It cannot be pleaded as a plea to the action. This is not a plea in abatment as said by Lord Kenyon. It differs from it, in form & effect. 3 & R. 361. 4 Bac. 44.

And generally, whatever may be pleaded as a dilatory plea, cannot be pleaded to the action. This is not an universal rule. 6 & R. 705.

And if a female marries pending a suit, the deft. may plead it to her disability. However if the time for pleading it as a dilatory plea has lapsed, it may only be pleaded, because the grounds of exception accrued after the proper time of pleading. 108 L. 316. 4 Bac. 39.

In London this rule is abolished, by Stat. The husband may appear, suggest the coveture on the record, and go on with the suit. Stat. 577.

6th. Infancy. That the p^tff. is an infant, being without his guardian or next friend is pleadable to his disability. An infant cannot appoint an Attorney, because he can't make a power of attorney, of course he must appear by his guardian or next friend. 3 Bac. 148. 149. 308 L. 301. 1 Inst. 935. 6 March. 123. - Dalm. 296. 1 Rose ab. 287.

Once more. It is said to be pleadable to the disability of the p^tff. that he is not in esse, that there is no such person in rerum natura. This objection should be taken rather to the action, because pleading the disability supposes that the p^tff. is in esse. 2 Inst. 104. 308 L. 301. 1 Bos. & Poul. 44.

These are all the enumerated grounds of pleading to the disability of the p^tff.

These pleas conclude to the person of the plaintiff.

Pleas and pleadings.

"Whether the pleas judge. if the said 13. (10th Jy.) ought to be answered. 3 Bla 303. Lawes 109.

Laws makes a distinction between a permanent disability & a temporary one. In the former case, the form is as above; in the latter the plea should be "And, the said c^t pleas judge. that the plaint may remain without day until" &c. Laws 103. 9. Tid. 585. Lecture VIII.

III. Of Pleas in Abatement.

The word "abatement" or law denotes prostration or demolition. Now the case of a "rescace". To abate a writ, then is to abolish it. Inst. 134. 3 Bla. 301. 2. 3.

Pleas or abatement extend generally to the writ, only. Mistakes in the count or declaration are to be attacked by pleas of a diff. kind. 3 Bla. 301. 1 Bac. 15. Salk. 298. Coath. 172. 3 Inst. 351. 64.

This rule tho' generally is not universally true. It is universally true that a plea which goes to the writ, only, is always a plea in abatement; but converso, it is not universally true, that a plea in abatement cannot extend to the declaration; for if there is a misnomer in the declaration, or a variance between the writ & the declaration, abatement may be pleaded. 3 Bla. 624. 3 Bla. 301. 3. Lawes 105. 5 Mo. 132. 144. 1 Com. 43. 36. 4 Bac. 8.

And in C^t we have a practice of pleading on a statement to a variance between an instrument declared upon & the description of that instrument in the Deed.

In C^t there is not the same distinction between the writ of declaration as in G^t Britain.

In C^t the writ consists of that part of the record,

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which precedes the statement of the facts or cause of action. Indeed the will contains all the part of the record from its beginning to the statement of the action.

"Whittemore" commences the declaration which contains the statement of the facts. The date is common both to the will and declaration.

The signature of the Clerk or Magistrate, the recognizance for prosecution, and the certificate of the day of the duty, all belong to the writ. There you will observe are no part of the pleadings.

In all pleas in abatement, the greatest precision & accuracy is required. The reason of this is, pleas in abatement are not favoured; they are odious in the Law; they do not disprove the cause of action, but only the form in which the claim is prosecuted. Hence the least inaccuracy in a plea of abat. is fatal. It is said, it must contain certainty, to a certain extent or every particular, i.e. there must be the utmost certainty on it. 30 R. 785.6. 59. R. 48.2. Lawes. 55.6. 107. 132. 88.11. 167. 276. 130. 530. Com. 19. 2. 1. 11.

Causes of pleading in Abatement. These causes are very numerous both in R. B. and in Conn. These causes may be either intrinsic or extrinsic, i.e. the exceptionable thing mislike, def't &c may either appear on the face of the writ, or it may be extrinsic, - and not appear.

I. Misnomer as a word of addition are grounds for pleading in abatement. And 1st as to the Defendant.

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It also is the omission of the deft's. addition a cause of abatement. The addition of a party is a description given of him in addition to his name to identify him more clearly. This additional description is called his addition. It consists in his title, trade, stat., office, profession, degree, place of abode. Thus if an action is brought ag. A. B. It is not enough to call him A. B. His addition must be given him. If he is a Knight or Esquire, he must be so described. His trade also must be given him, as Merchant, Tailor &c. These are required by the Eng. Stat. 1 Hen. V. called the Stat. of "Addition", for the sake of obtaining more certainty. The Com. Law do not require all these additions. 3 Bac. 617. Paues 106. Cro. 6. 371. Bell. 8d; 105. Barth. 14.

This Stat. only relates to personal actions, appeals, and indictments, and not to real actions. They continue to be governed by the rules of the Com. Law. The reason of this is, in actions real, as the action is brought ag. the party in possession of the subject in dispute, his possession was supposed to identify him sufficiently. 3 Bac. 618. Bell. 8d.

And as the want of addition is pleadable in abatement, so is a mistake in giving him his addition pleadable in abatement. As if a Knight is called an Esquire it is pleadable in abatement. The uncertainty by this is made greater. 3 Bl. 302. L. Ray 1014. 1 Com. 28.

In Com. the only necessary addition in common cases, is the Defend's place of abode. But where he stands in his official or civil capacity, where the official capacity, is in due regard to the action, that is necessary to

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be added here as well as in C. q. This however is not to identify the person; it is only to show the character in which he is sued. This is not then properly an addition, contumeliated by the Stat. So if an heir is sued for a Bond due by his ancestor, he must be described as such. as he is, for he is only liable as heir. So if one is sued as Exec. or Administr. he must be described as such; so if a Sheriff is sued as such, he must be described as Sheriff. This is also the case as to all other Officers, liable on their official capacity. 4 Bac 39. 2 Virg. 84. Coart. 301. 2.

But where an addition by way of identification is unnecessary, it is mere superfluous, and therefore a mistake does not vitiate it. The maxim is, "utile prout inutili non vitiatur". Ex. q. A is sued for a trespass committed by himself & is described as heir of J. S. This description is nugatory of itself, and therefore if he is not the heir of J. S. it can do no harm. Bro. 233. a 233. 3 Bac 621.

The mistake or want of addition in one of two co-defendants is not pliable by the other. Advantage can be taken of it only by him who is misnamed, or whose addition is not set out, because the person who is misnamed may waive it if he chooses, & the other defendant make no complaint. 3 Bac 526. Litt. 36. 40 Bac 38. 1.

And the rule is the same in criminal cases, where two are regularly indicted. 2 Hale 177.

A question of this kind has been raised. If one of two Debtors is misnamed & he pleads it in abat. does the suit abat in toto or only as to the person misnamed? This question has not been settled. In the discussions to be found in the Bos. & G. no mention is made of a con-

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consideration, which appears to me to be the crucial point. It is this. If the cause of action is joint, as a joint only it must abate in toto. If it is joint and several it need not abate only as to the person misnamed. Fourth 26. 8 Co 154. 63 Bac 625. 1 Com. 79. 4 Bac 45.

When a defendant pleads a misnomer or want of ad-
dition, and in general he who pleads in abatement
at all must (as the expression is) give the plaintiff a better
will. He must point out what the writ ought to con-
tain; he must show a mistake & how that mistake
is to be rectified. There is no such thing as this in plain-
ing to the action. That if one is sued by the name of
J. S. he must plead more than that his name is not
J. S. he must plead his true name. This is required
of him as a condition. So if he is described as an Esquire
he must show his title, that the plaintiff may know by what
title to sue him. So if one of two joint debtors is not sued
he must not only state that he and another person are
liable jointly, but he must state, who that person is.
Fifth 363. 8 St. R. 515. Will. 554. 5 Ann. 34. 103. 4. 1 Ray. 1178.

And he must go farther. He must not only
plead that his name is J. A. not J. P. but he must also
prove that he was ^{known} called by the name by which he
is sued at the time of issuing the writ, because a person
sometimes has two names. It is not indispensable
that he should be sued by his baptismal name, for
if he had another name & was called by it at the time
of the writ, he may be sued by it. And it is not suf-
ficient that he aver that he is called by such a name.

(1) Pleas (cont'd.) / Pleadings.

but that he was called by such a name at the time of the writs issuing. Willis 524 Lawes 39. 103. Salk. 6. 7. 1 R. Ray 118. 249. 44 Mod 447. 3 Bac 624. - Skinner 629

And if according to the rules of verbal criticism the Deft. admits in his plea that he is the person named his plea will be bad. If this is done by implication "as the said A.B. &c." it is bad. Yet he must admit himself to be the person sued. Lawes 92. 5 T.R. 487.

Advantage is to be taken of a misnomer or, by a plea, in effect, only. If it works a variance it may be taken advantage of in some other way. But this would not be a misnomer in itself. If he omits to plead in abat. he waives the misnomer, for a misnomer is no ground of error. Roll. 780. Coath. 124. Salk. 2. 3 Bac 623. 4. - 6. 5. R. 766. 2a. in 3. Bac 616

And it is said if one sues a specialty by a wrong name, he must be sued by his wrong name, and execution must issue under the same name, and the right name can come in under an alias. This does not seem to me to be the proper mode of pleading. The only proper way is to sue him by his right name and aver that he executed the instrument by another name. This aversion is necessary to prevent a variance. - Pla 1018. 3. Bac 617. 1 Buls 216. 3 Bac 614. Dyer 273. 2a. in 3. Bac 616.

And the writ should always describe all the Dfts. by their proper names, except in the case of corporations aggregate, long all who are jointly liable ought to be sued, & that by their respective proper names. The arbitrary name of a firm is not sufficient. Now if you are in w^t a firm, you must describe all the persons composing that firm. 82 R. 508. Lincoln's Inn 240

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This is not true of corporations. It is true only of natural persons. Corporations must be sued by their corporate name. A corporation is a legal ideal entity; if all the members of a corporation are names, it is bad. Leach 244. 113 C. 111 "Corporations."

Formerly it was thought that if the mistake was in the christian name, it was fatal, but if in the surnames it was not. This grave distinction has not obtained in Conn., and it is ch't would not now be considered as 'Law in G. Britain. - 1 Inst 35643. Sma. 1218. Will 55343 Ex. 6 III.

Where a Df. is misnamed, he may not for his own security take advantage of it, for if he is afterwards sued by his right name for the same cause, he may plead the former judge in Bar and aver that he is the same person sued in the former action & that the suit is for the same thing. Sma. 1218. 4 Inst 38. 30. 625. 8 T. R. 508.

Misnomer of Pff. This may be pleaded in abatement. This is a rule of the Com. Law. 1 Com. 14. 15. 3 Bac 617. Euse 542.

The want of, or mistake in addition is not in most cases a defect at Com. Law.

A replication by the pff. that the Df. was as well known by the name by which he is sued, as by the other name, and such a replication is good, and if it is true or amounts to the Pff. will recover. 1 East 542.

But every addition in the pff. is not pleadable in abatement, except at Com. Law. At Com. Law if the degree was as high as that of a knight he must have had his addition, otherwise not. The place of abode must I think be inserted. It is supposed rightly.

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that there is no great danger of the party being mistaken. At any rate the case of the pess. is not within the Stat. Hen V. 1 Conn. 15. b Mod 85. 3 Bac 617. 618. & Note 469.

At Conn. Law a misnomer was not pleadable to an indictment for felony, as the person of the criminal slandering at the Bar with his uplifted hands, was made sufficiently certain. 1 Wash 243. 2 D. 186. 2 38. 176. 4 Bac 38. 1 Sim 40

This is now altered by Stat. Hen V. because it reaches to indictments. Lro. C. 104. 1 P. 48. 2 Wash. 186.

In Conn. the right's name must be inserted, altho we have not adopted the rule introduced by the Stat. Hen V. in personal actions. This however can do no good, because he is in the custody of the Co. & they will not discharge him but keep him in custody until another indictment is drawn..

As to petty offenses where the defenda can appear by attorney, it w^tll be of use to plead a misnomer. Secular II.

III. Coverterre. Another cause of Abat. is the conversion of the defenda. The general rule is, that a feme cou. nt cannot sue alone, and when she may sue alone, she is considered as a feme sole tho her husband be actualy living. 1 Frost 132. 41 Bac. 39. 1 Dice 140. Whereupon she may sue what

But if a feme sole being sued, marries pendente lite, the suit does not abate on this account, because it would be to defeat the suit by her own act. The suit is rightly commenced, the right of the pess has attached, & she shall not be able to defeat it by her own act. 16 Bac. 9. 10. Lro. C. 323. Dice 87. a. 811. 12a Ray 1525. C. p. 19. 328.

If a feme covert when sued, "would take advantage

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of her covtire. She can do it only by h[er]s in Abat. It cannot be taken advantage of by her plea to th action. If she does not plead in abat. she waives her objection. Latch 24. Luter. 23. 1178. 4 Bac. 24. 39.

But tho a married woman, when sued alone does not plead it abat. & therefore cannot herself take advantage of the defense afterwards, yet her husband may come in & plead her covtire in Bar in any stage of the proceedings; and if he does not do this & judge. is rendered vs her, he together with his wife may reverse it on a writ of error. The reason of this is, the wife can not destroy the right of the hus^b by her own act. of course her waiver of the covtire does not affect his rights so that he cannot take advantage of them. 37 R. 631. 5 B. 681. Latch 400. 5 Coup. 193. 4 Bac. 10. 29. 39. Latch 24.

This writ of error is founded upon an error in fact. It does not appear on the record, for there is supposed to be no plea of covtire. This is a writ of error coram nobis, i.e. before the same let. ch. over the action.

The hus^b wife must both join in this writ of error, that it may be known that she is really a feme covert, & court of the husband claiming a reversal of the judgment. Esh R 16 or 19.

And it is a good cause of Abatement. That two people suing, or two defend's being sued as husband and wife, are not in fact hus^b & wife. Thus if an action is brought v^s A. and B. hus^b & wife, it is pleasurable in abat. that they are not married. Laws 105.

But it is no cause of abat. that the defendant is an

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Infant & that his Guardian is not summoned to appear and defend. The regular course in Eng. in such a case is to appoint a Guardian, *ad litem*; ^{Chancery} 56033. 1 Inst. 89 note 135. 3 Blac. 149. 3 Bla. 427.

In Com. where the infant has a Guardian appointed by Law, or a Father who is his natural guardian, he is regularly to be summoned to appear & defend. Another course is to give the p^lff time to summon or ch. Guardian. If the infant has none, the Ct. will appoint one "*ad litem*" as the Cts. ordinarily do in Eng.-

To the p^lff upon request may have him summoned, as judgt. would be erroneous if recovered against the infant solely, or with^t notice to the Guardian? -

That an "*heir*" who is sued on the d^l of his ancestor is an *infant*, is no cause of abatement; nor is it any defense to the action. When he is sued on *his own* contracts, he may generally defeat them by the p^lia of infancy. But here he is sued on the contract of his ancestor. In this case the rule of the Com. Law is that the "parol shall dormer," that is, promises shall be stayed until he attains full age. 4 East 485. Lewis 105.

And in Conn. we have a Guardianship unknown to the law of Eng. - Under our Stat. Law the Selectmen of the Town under some circumstances, and the County Court under others, may appoint, in one case, overseers, in the others conservators to care for persons, who are not able to take care of their property; who thus become wards, & during the time of their conservatorship, the person is not liable to be sued alone. But here of he is not

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joined it is no cause of abat. in the first instance, for the Ct as in the former case will grant time to summon him to appear & defend. Rely 174.-

1111. Another cause of abat. is the death of parties. As soon Law is a sole poss. or sole wife. disjoining the suit, it ipso facto abated. There was no rule established for continuing it after this time. 1 Com. 5. d. 1 Inst 139. 4 Bac. 40.41. 10 Co. 134. Crs. 2. 982. 13 Bac. 7.

And if one of several parties die, except in personal actions after summons & service, the suit abated.

It summons and servitude is where one of two persons having a joint right refuses to join in the suit, for its recovery. In such case the other may sue in the name of both & summon him to appear; and if he does not appear the Ct. will swear him, and enter it on the back of the record, when the party prosecuting may proceed as tho he were alone...

But if in a personal action there had been a summons & service & the person served died, his death did not affect the suit...

In real actions, there was no exception. The reason for this difference between personal & real actions in this particular, cannot be easily understood. It is this - that by the death of one in a real action, the extent of the survivor's right is increased. So it is in personal actions. This also is a technical reason, but it would take too much time to enter into an explanation of it in this place... 10 Co. 134.

6 D. 26. 13 Bac. 7. H. Recy. 463.

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But it was a general rule ever at Com. Law, that if one of two Defendants dies, pending the suit, it should abate. But in such cases the Plff. was to make an entry, of the deceased Defendant, & proceed against the survivor. 133a.c. 8. 1 Show. 186. 3. Mod. 2419. Reversed. 151.

If however in such a case as this, the Plff. should take judgment against both the deceased & the survivor, the judgment would be void in toto. These were the rules at Com. Law. Rauch 1419.

But now by ch. Stat. 17. Cap 2. and 8 and 9. William 3. in Eng. and in Com. by a similar Stat. the inconvenience by the death of Parties is in a great measure remedied. Under the Stats. if one of two Plffs. dies, pending the suit, the suit does not abate, if the cause of action is such as would survive in favor of the survivor. Also in the case of two joint obligors, or where the joint rights of two or more are violated.

So on the other hand, when one of several Defendants dies, pending the suit, the suit does not abate, if the cause of action be such as would survive in favor of the survivor. In either of these cases of the death of the deceased party registered on the record, the suit will proceed. This must be done, the just. will go on, all, & it will be erroneous. 4 Bac 42. 2. Mod 115. Stat. Com. 22. 3. 1600 54 5. 6 and.

And under these Stats. of a sole Plff. or a sole Def. dies, pending the suit, it does not abate, if the cause of action be such as will survive to or against the personal representatives of the deceased. This rule does not

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obtain in Eng. until the death of the party happens after some interlocutory judgment obtained. 4 Bac 4th.

In Conn. it makes no difference. The rule prevails in every stage of the suit, the no judgt. has been obtain'd. Stat 22.

The reason of the rule as it is in Eng. I suppose to be, that any interlocutory judgt. supposes both parties to have appeared.

In this last case, viz, where a sole Jeff. or sole Defd. dies if the Jeff dies the Exec. or adm^r. may enter & propose to end the suit, by suggesting the death of the Jeff on the record.

If a sole Defd. dies, the Jeff must do something more than suggest the death of the Defd. on the record, he must have a scire facias vs. the Exec. or Adm^r. to show cause why judgment should not go vs. him. This difference is perfectly proper & reasonable.

It is to be observed however, that our Stat. relates only to suits in the Supr. Ct. & Ct. of Law. Thus therefore before a single magistrat the rule of the Com. Law must prevail.

But there are ^{any} ~~any~~ supposeable cases, for which these Statutes do not in terms provide. Suppose two Jeffs die at different times pending the suit. What is to be done with this suit? In my opinion in the first instance it survives to the survivor, on the second place if survivor, I think to his Executor.

Suppose two Defendants die, at different times, pending the suit; the same course must be pursued. It survives in the first instance against the surviving Plaintiff and then vs. the Exec. or Adm^r. This can only be true where

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The cause of action survives in favor of, or against, the survivor. -

In these cases the Exec. of the last surviving wife is accountable to the Execs. of the other perfs. for their share of what he recovers. And the Execs. of the Difend. are liable to the Exec. of the last surviving Difend. for their proportionate share of the burden, which has been recovered against them. -

Real actions abate in most cases upon the death of a sole Wife, or sole Difend. They remain as at Com. law because the Stat. does not affect real rights. The Stat. speaks of actions surviving against personal representatives, not of the heir, remainderman, or revisions. It relates only to personal actions..

But real actions where there are several Diffs. or several Difends. are within the Stat. Here it does not mention personal representatives, but the surviving original party. Here the action will not abate by the death of one, if the cause of action be such as would survive in favor of the surviving wife in the one case, & q.t. the surviving wife in the other. 1 Bac. 7. lro. C. 892. 1 Inst. 179.

It was decided in the year 1800 by the Supreme Court that petitions for new trials are within our Stat. that the Stat. makes use of the expression "all actions". This judge was affirmed in the Supt. Ct. of Errors June 1803. and yet the Stat. was made long before new trials were known by our law. But the decision says all trials, & conceive it to be correct. The case was Moor, et al. vs. Thibault. Reported in Bags. W.

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IV. Variance. Another cause of Abatement is variance.

In the first place if the declaration varies from the writ it may be pleaded in abatement. It is said that here the Declaration itself abates the writ. 2 Eliz. 5. 2 R. 249. 4 Bac. 3. 4.

And it is said especially on the old Books, that where the variance is in form only, no advantage can be taken of it only in abatement. But if the variance is in substance, this plea, though it may be made, is unnecessary, for judgment may be arrested after verdict, or the Court in equity ought to dismiss it. 2 R. 5. 12. 1. 165. 2 108. 722. 2 Eliz. 120. 2 Hob. 279. 2 Ch. 75.

In Willsons Reports however, the Chief Justice intimates that the latter branch of the rule is not the practice, for the variance, he says, must always be pleaded in abatement. And his opinion seems to be supported by others. 2 Will. 394. 4 Mod. 246. 2 Atk. 658. 701

A variance in point of form, consists of such mistakes as those of giving the defendant a different name, a addition w^t or in the Declaration from that in the writ. Variance in point of substance, consists in giving the def^t a different title, quantity of interest &c in the Decl. from that in the writ.

Again, a variance between the instrument recd or, & the description of the instrument in the writ is good cause of abatement. Thus if the writ states a sum for 100 £ & it is found to be a bond for 50 £ it is a variance pleadable in abatement. These variances, as

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you perceive are numerous: If there is a misdescription, it is a variance. Follow 84. 6 Co. 12. 2 Wils. 282. Laws 106.
4 St. Rep. 314. 612. 1 Bos. & Pul. 67. 1 St. Rep. 656. Follow 640. Com. Abat. 8. 17.

But if the variance is between the instrument or the action is founded on the description of it in the declaration the usual mode of taking advantage of it, is by pleading the variance of issue, & objecting to its being given in evidence to the Jury, & thus working a nonsuit. St. R. 55⁴ Follow 640. 1 Bos. & Pul. 7. Comp. 766. 7. 1 Sand 154 note 4. St. R. 612. 887. 8.

In Conn. on the other hand advantage is taken of it by plea or abatement, usually. This although is not necessary, may be done. It may be taken advantage of, here, in the same manner that it is in England. Salk. 654.

It is said by Cornays & I presume he is Law, that this may be taken advantage of in England by plea in abatement. 1 Corn. 44. Doctrina Placitorum 1.

With regard to this kind of variance, advantage may be taken of it in either of four different ways; 1st By plea in abatement; 2nd By objecting to its being given in evidence under the ten. issue; 4th By praying out of the instrument, placing it on the record and then disallowing it. Laws 51. 99.

* But the Declaration cannot be allowed after justifying the variance upon the record after issue, since all the objections which can be made to this, must be made to the Decl. itself particularly what originally appears upon it. But the Declaration is good before any issue & this cannot vitiate that. 1 Paradis 154 note. 317. B. & T. 313. Follow 208. 213. 2 Str. a 1146. 2 Wils. 389. Stirley 106. 7. Bob. & L. Laws 51. 19. 2d ad. 13. giving a new issue & judgment. + see Supplement p. 1

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Misjoinder of such must be pleaded in abatement.
But if in a written instrument, misnomer occasions no
harm, it may be taken advantage of as a ^{written instrument} misnomer; but
it is then not triable as a misnomer. It is treated as a
variance. 4 C. R. p. 612. & T. R. p. 656. § Lecture X.

V. Another cause of abatement is the non joinder
or misjoinder of parties. Under a former division of this
subject I considered what things might & what might
not be joined in one Declaration, & also what parties
might or might not be joined in one suit. I am now to
consider the ways in which advantage is to be taken
of these defects.

It is a general rule that if one person sues alone
where several ought to be joined with him, the nonjoiner
is always pleased in abatement. I am now speak-
ing of the non joinder & misjoinder of necessary plaintiffs.
Anse. 164. 189. 195. 198. Salk. 4. 1. Faund. 291. Com. 10. 11. J. T. R. 243.

This general rule extends to all cases of torts as well
as to contracts; in fact to all actions whether real, personal
or mixed. That of one of two joint tenants bring an action
for an injury to their joint tenancy, the omission of the
other is pleadable in abatement. So the rule is the same
where one of two joint obligors, promisors, covenants &c
of sometimes in the case of tenants in common. Cro. Elij. 143.
260. 22. 1. Com. 10. 1. Roll. 2942. 260. 72. 1. Com. 3157.

It is therefore ~~as to the law~~. Where there is a non-
joinder the mistake is pleadable in abatement, so on
the other hand if several sue where the right of action
is in one only, this misjoinder is pleadable in abatement.

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If A executes a note to B. and B and C. bring an action upon it, A may plead in abat. to it. 1606.72. 1 Leon? 315. 1603. 10.

This rule then you see is general and extends to all cases. with. that the mistake may be pleaded, or abatement.

But further. If in an action on Contract ~~with~~ one sue alone when several ought to join it may be taken advantage of under the gen. issue as well as under a plea of abatement. —

On the other hand if two or more sue on a Contract where the right of action is on one only, advantage may be taken of it in the same way. He may plead in abatement, because there is a wrong joinder or misjoinder, and he may take advantage of it under the gen. issue because the contract sued upon is not the contract intended into. The evidence does not support the declaration, as where J. S. makes a contract with A. only; A. and C. bring an action on this Contract agt. J. S. The agreement that J. S. made the contract with them both is not substantiated, & therefore advantage may be taken of it under the Gen. issue. 2 Stra. 820. 1 B&P. 75. 2 T.M. 282. B. N.P. 152.

The defendant may also in this case pray contracts, taking advantage of the non or misjoinder on another way. He may pray copy of the contract, when it is a written one, place it on the record & then dismiss to it. This is only true of written contracts for you cannot pray copy of a verbal contract. This can be taken advantage of only in the two ways before mentioned. 1 B&S. 4 P. 6. 57. 75. 1 Par. 153. 248. for copy note.

And if in an action on contract one sue who

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another ought to be joined & this appears upon the face of the declaration (when he could be joined) the mistake is a factual one, & is not wiped out by a verdict. 5 Bac 18.
2 Str 1146. Salk 32. Esp 304. 1 Bos & Pol 67. 18 Sand 153. 291 f.

But in torts it is otherwise. The mistake is not casual. Salk 32. 6. 21. 16. 705.

The reason of the difference in the two cases is this. In the case of contracts there is no cause of action appearing on the face of the declaration. In the case of torts after verdict, as it appears one has done the wrong it makes no difference whether any one has assisted him or not, or whether the right violated was joint or not.

And in actions founded on Tort, if one suit alone where others ought to join, the mistake must always be placed on abatement, & no advantage can be taken of it under the Gen. issue. This is the general rule. Salk 290. 2 Str 820. 1820. 1146. 1 Sand 291. 67. 21. 16. 706. 5 D. 649. Esp 221. 143.

But if two sue in tort where the right of action is in one only, advantage may be taken of it under the gen. issue. 5 Bac 200. 67. 2. 143. No advantage of the non joinder can be taken under the Gen. issue, because the party has an interest. The Defende. has done a wrong. But in the latter case where the defect is in the non joinder, advantage may be thus taken of it, because he in whom the right of action is embarks this right with a stranger which he cannot communicate. The objection then here goes directly to the merits of the case. The Defende. may truly say "I am not guilty" I am not bound to answer to a stranger. 5 Bac 200. 67. 2. 143.

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The last rule (where there has been a misjoinder) has been decided to be law in our Supt. C. or Fairf^{ld} 6th. A.D. 1805.

And if one part owner of a personal chattel, sues a cause for a tort, and no plea in abatement is given in, and by the defendant is waived so that judge, you rule. that the other part owner may afterwards sue alone for his part of the damage sustained. 12 T.R. 729. 1 Esp. R. 116. 2 D. 586. 622.

Thus far of the non joinder & misjoinder of plain tiffs; as to the non joinder or misjoinder of Defendants, some distinctions are to be observed. If one of two persons ^{junctly} liable on contract ~~are~~ is sued alone, the non joinder must be pleaded in abat^ment, or it is waived. In the case of pess. you have seen the rule to be otherwise, for there advantage may be taken of the defendant by the general issue. There is an exception however to this rule, for if it appears from the fact of the declaration, or any other pleading on the part of the pess. that another person ought to be joined, the mistake is fatal to the declaration & cannot be cured even by verdict. 5 Barb 2611. lead 3 car. 2 H.L. R. 947. 5 T.R. 651. 6 D. 322. 369. Lomp 832. 376. Bl. 238. 1 Saund. 291. 5 Co 119.

Formerly this rule (viz. that abat. must be pleaded) was otherwise. It might have been taken advantage of under a general issue. If you consult all the authorities, both ancient & modern you will find it difficult to reconcile them all. The modern authorities however have completely settled the point. Salk 440.

Suppose that A. & B. execute a joint bond & A. alone is sued, he must plead the non joinder or abatement; for if he pleads the general issue, he pleads that it is not his act of deed; but it is his act & deed, tho' it is not his sole

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act of deed. So in the case of joint promises, the one would plead that he did not assur. & promise, but he did assume some promise, tho' not solely. The reason of this rule is applicable to parole contracts is obvious. There are frequently dormant partners in a house, but if the active partner only is sued on the contract, in his plea of abatement he must discover all the partners. But if he could plead the gen. issue he would be obliged to discover no more than one partner to avoid the suit, which would be subjecting the pess. to great inconvenience.

And in these cases where one is sued alone, when others ought to join, if another action is brought and a new Defend is joined, he may plead that there is another who ought to be joined. The man who is first sued, can never plead again that there is another who ought to be joined. It belongs only to every new Defendant. 3 East 70.1.

But if it appears upon the declaration or any other pleading of the pess. that ~~another~~ ^{an} other person was jointly bound with the Defendant & that person is amenable, (as if he is described as in being) the nonjoiner is an incurable defect & judge may be arrested after a verdict for the pess. If this does not appear advantage can be taken of it only by plea in abat. as was done before. 5 Bur. 2614. 1 Wm. 34. 2 Saun d 291. 6 C. & C. 6⁴ C. T. R. 749.

With regard to Defendant's actionsounding in courts there can be no objection taken either by plea in abatement or otherwise. For all courts are in their nature joint & several. The act of one is the act of every

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other. Therefore one or all may be sued. Consequently it now
can be objected to an action sounding in tort that the
Defend. & another is jointly liable. There is no jointure about
a tort. 8 Co. 159. Pla. 420. 1 Barb. 291. 3 Bac. 192.

And on the other hand if one commits a tort alone
& others are joined with him he cannot object to it, because
the others may show themselves innocent if they can. But in
contracts all or none are liable. A recovery must be had
on that as stated or not at all...

There seems to be an exception to the last rule, when
the action concerns the real property of the defend. It is
said by Dr. Kenyon, that where one of several persons is
sued in tort when the cause of action affects the real pro-
perty of him and another, the action is not rightly brought.
Thus A & B are owners of land & liable by law to repair
a way; A is sued alone, he may plead that B. ought to have
been joined. 6 T. R. 851. 1 Paus. 221. 2 Bl. 182. Com. Law. abut. f. 6.

When the contract is joint & several, it has been
observed that one or all ought to be sued; but that
two of those persons jointly & severally bound could not
be joined. With regard to taking advantage of this lat-
ter case, the rule is, the mistake must be pleaded in
abatement. No advantage can be taken off it in any
other way. 1 Paus. 291.

Thus far we have treated of nonjoinder of co-
-party defendants.

On the other hand if two or more are sued on con-
tract when one only of liable, advantage may be ta-
ken of it under the general issue. A and B make a

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joint promise, but the p^tff. brings his action on the promise agt. A. B. and C. - C never made the promise. The misjoinder may be taken advantage of under the general issue, because the evidence cannot support the Decl^a. East 48. in the Cor. This has been decided to be law in the case of, Phelps & Battle.

And it seems that in such a case as this, if the jury find a verdict agt. him who made the contract & in favor of him who did not make it, judgment may be arrested by him agt. whom the verdict is found, because the contract in the Declaration is negatived by the verdict. 3 East 62. Cath. 381

These distinctions are extremely important in practice; hardly any branch of the title of Pleadings is more necessary to be understood.

VII. Another cause of abatement is the pendency of a prior suit, for the same thing between the same parties. It is a legal maxim, that the Law abhors a multiplicity of suits; and this rule is made to prevent the p^tff. from harrassing the Defend. with suits. No man having commenced one suit, well adapted to his case on one cause of action can commence another for the same cause agt. the same person; & if he does the pendency of the former is pleadable in abatement to the latter. 1 Bac 13. 40. 48.

This rule (as it plainly implies) applies only where the suits are of the same kind, or at least concurrent, in other cases of action the same in both. It is not necessary that they should always be of the same kind, for many actions are concurrent, which are not of the

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same kind as Trespass & recover frequently. - 5 Co 61. a. and b.
R. 184. 4. 600 43 a.

But tho' two suits are pending between the same parties & tho' the cause of action arises from the same transaction, i.e. out of the same facts, yet if the thing for which the action is brought is not the same, the one is not pleadable in abatement of the other. As in the case of a Mortgage, where ejectment, action on the bond or bill filed in Chancery to foreclose may all be bro't. on will not abate the others because the objects of them are all different tho' they all arise out of the same transaction. Com. 49. March 18. 539.

And the plea (viz. the pendency of one suit, for the same cause of action) is good, tho' the suit is pending, before another Court.-

In Eng. there is an exception to this rule, where the former action is in an inferior court, because a superior court may remove every action from an inferior, by writ of citatione. 5 Co 62. 4 Bac 48. 26 Wil 87. 1 Com 49.

Under the Laws of Con. there is very little application of this rule, for there are very few cases where the Courts have concurrent jurisdictions.

And for the purpose of defeating the latter suit, it is not necessary that the former suit be pending at the time of pleading in abatement to the second. It is sufficient if it is pending at the time of commencing the second. The second is always, in this case, where commenced during the pendency, considered a continuacion. Doctrina Placitaria 10. 1 Bac 16. 4 Bac c. 49.

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Upon the subject of this plea there has been a series of decisions in Conn. perfectly consonant to principle tho there are no precedents in the English Books.

It has been decided that if the first suit is wholly insufficient the pendency of it shall not abate the second, for it cannot be vexatious. Thus when property attached by the first process is found not to be the property of the Defendant. the plaintiff during the pendency of this may sue him on another attachment. The pendency of the former will not abate the latter. Or suppose the property attached be found to be of no manner of value, the rule is the same. So of the first action is clearly misconceived & not adapted to the case, the plaintiff being a second during the pendency of the first action. Indeed the English rule requiring that the actions should be concurrent. Thus suppose an action agt. a bailee & the plaintiff sue in trespass when trove only would lie, if the plaintiff bring trove during the pendency of the action of trespass, his suit will not be abated. Root 365. 562.

Indeed the very object of the rule is to prevent vexation. But in the case above there is no vexation, where you conceive where the ~~second~~ second is not vexatious the pendency of the first will not abate it.

The pendency of one action of Book debt. in Conn. does not prevent the defendant from suing the plaintiff during the time on book, for there may be cross suits between the plaintiff & defendant on book. Each may challenge a balance indeed in the original action, the defendant may recover if he is entitled to a balance. But our Stat. precludes

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the Defendant from costs if he neglects to present his books for a valuation to be made on the first suit, unless he has very good reasons. Stat. 136. 1 Root 185. -

The plea of a pendency of a former suit is good for the same cause, altho in the second suit a new Defendant should be added. The better opinion seems to be, that the suit will abate as to all the parties in the second suit. Thus if A. S. brings an action v. C. & before this is disposed of brings a second for the same cause ag. A. and B. the first may be pleaded in abatement of the second. 4 Bac. 40. 9. Hob. 137. 96. 7. 127. Barth 96. 7. 1 Bac. 13. 14. (Latu. 42. 18. 2 Low 7. 1. contray)

On the other hand, tho' one of the Dfes. on the first action ~~is~~ omitted in the second, the pendency of the first is pleadable in abatement to the second; and how the last must abate entirely without doubt. You will however remember if the first action should be misconceived the pendency of the former is not pleadable in abatement of the latter. This follows from the rules before given. 1 Bac. 13. 14. Hob. 137. Barth 190. p. 1.

To prevent the rule from operating unjustly on it self, it is settled that if the second action is commenced on the same day the first is abated, the second shall be presumed to have commenced after the abatement of the first so that the pendency of the first is not pleadable in abatement of the second. The law allows no fraction of a day for this purpose. This is a presumption of law not to be rebutted. 4 Bac. 42. 9. 10. 14. Allyn 84. Title 6. 2. 240.

But it is no cause of abatement that another action for the same cause is pending agt. a stranger to the first.

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has nothing to do with the procedure of this suit. Plea.
42. 260. 137. 8.

And it is no ground of abatement in criminal cases that another informant's indictment is pending against the defendant for the same offence. Courts of Criminal jurisdiction have a kind of discretionary control over indictments. They will quash the one or the other as they think proper. 2 Banks 190. 275. 387. 113 or 13.

But in the case of informations filed by the attorney general, or officer or presented by some informant, the court has no such discretionary power. The general rules with regard to civil actions apply in this case. (Bac 13. sub supra.)

But if two informations are exhibited by different informants against the same individual, for the same offence, on the same day each will abate the other, & neither can proceed. Neither of these parties can claim any justice for himself. One informant is a mere volunteer & is entitled to no indulgence. The day is a punctuation suspensio & the court will suffer no proof to be introduced to show that one was commenced before the other.

Robt. 128. Moore 844. 5. 1 Com. 4. f. Robt. 864. 5. 3 Lecture XII.

VIII. The writ having evidently issued is another cause of abatement. And it may be laid down generally under this head, that any irregularity or informality in the writ is a ground of abatement. (Lawes 104 or 105.)

None of the writ is made returnable to any other than the next succeeding term of the Ct. to which it is made returnable, provided sufficient time has intervened between the date of the process for legal service.

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This writ is not only abatible, but it is absolutely void, for if the party was at liberty to pass over one Count, he might two & so on for 20 years. - The Defendant ought to have immediate relief, because, as the case might be, he might be liable to Bail for an indefinite length of time. Yet if there is not sufficient time for legal service the writ may be made returnable to the next Court but one. 3 Will 34 Chath 200. 1 Rowl 315. 6.

So if the writ is not signed by proper authority, it is abatible. Yet this need not be pleaded, as it is in itself void, & every person acting under it a bypasser.

And on Con. where our Statute law makes it necessary that the duty should be certified, where there is the want of this certificate of the payment of the duty, the writ is not abatible & is void.

A want of date or an impossible date will abate the writ, as the 30th of February; and on Eng. the date cannot be amended. 1 Pow 80. 4 Bac 43. C. 2. S. 592. 1 Rowl 304. 16 Com. 40. 18 a. v.

In Con our Sup. Ct. have given no decision on the subject of amending the date. But the City Ct. allowed it to be amended in the case of Upshams in Suffolk County.

A defective return is also cause of abatement, that is, if the writ is made returnable within the period limited for its return, or in other words of a shorter time, intervening between the time of service & the term than the law requires. Cro L 50. Gallt 63. 1 Rowl 406. 2 Inst 25. 2 H. 6. 461

In Eng. the time limited is 15 days before the Courts in Westminster Hall. - In Con. 12 days are allowed by our Sup. & City Courts; 14 in case of foreign attachment, and 6 days before a single magistrate. -

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So also if the return of the officer, i.e. the service is insufficient on the face of it, that is to say, is a cause of abatement. But if the Sheriff's return is on the face of it sufficient, it cannot, in law, be contradicted by a plea or abatement. The party is left on such case to an action on the 3rd ff. for a false return. 2 Inst. 813. a 818. 1 Edw. 6. 373.

But according to our practice in Conn. if the service appears defective either on the face of it, or by way of thing done by the Defendant may plead an abatement to it. The instrument may be contradicted for the purpose of abating the writ.

The omission of some requisites necessary by our Statute does not have the effect of abating the writ. Thus if the Plff. omits to leave a copy of the writ with the Town Clerk as the Law requires when he attaches land, this cannot be pleaded in abatement. The object of the Statute is to give notice to third persons of the lien upon the land by the attachment, & the Def. has no reason to complain of, the Stat. is not followed in this respect. It is enough for him if he has had due notice. Stat. 33.

But if where property is attached by the Sheriff a copy is not left with the debtor, the writ will abate, provided there is not sufficient service in any other way, in which case it will not abate, as if the writ be read to him. The effect would then be only this, that the Plff. w^t not obtain a lien upon the property. 1 Root 54. 128. 363. 2 Root 130. 346.

VIII. The want of a venue in the writ is a defect which is pleadable in abatement. The want of a venue in the dictum is cause of Damages.

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This word, venue, in Norman French signifies "migl. bournhooy". And it is used in Law to denote the County where the action is laid &c.

According to the strict theory of the ancient common law, every action must be brought in the County where the cause of action arose. In local actions the rule is strictly adhered to, but in transitory actions we have seen it is avoided by fiction. 5 Bac 332. 7 Eliz R. 243.

As in transitory actions the laying of the venue is mere matter of form, it follows of course that if the venue is wrongly laid it is no cause of abatement; consequently it is not necessary to lay the venue as it really is in matter of fact. The Ct. on motion might be sure, in its discretion change the venue, tho' it is not done done. Yet a false venue in transitory actions is no cause of abatement. 2 Park 449. Conf 510. 13 East 79. P. 20. 245. 3 East 329. 2 Ann 174. Sid 44. 1 Bon 44 or 47. 117. 118.

But in local actions the venue being matter of substance, the laying of a wrong venue is a cause of a -
abatement. As in Per haps you are clause frig. it. an
action br't. in the County of N. & the land described as ly.
ng in that County, it is good cause of a abatement of the
lands lie in the County of D. 1 Bac 34. 7 Eliz 2. 3 Bon 10. abatm. L. 17.

The rules as to venue are not the same in Eng. as in
Eng. because the rules of pleading in this respect is dif.
ferent. In Eng. in transitory actions it is not material
over in theory where the cause of action arose, because
under our law the action is to be br't. in the County where
the Pltf. or defend. lives, before Supreme or County Courts,

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The residence of the p^tff. or Difend^t. determining the jurisdiction. If the action is before a single minister of the Law, the rule is, the action must be b'rt in the Town where the plaintiff or Difend^tant lives. This is analogous to the former rule. Stat. 26.

Where the p^tff. is out of the State, the action must be b'rt in the County where the Difend^t. lives. And if a p^tff. out of the State sues before a single minister of the Law, he must bring his action in the Town where the Difend^t. lives. If the writ there is defective in either of these particulars, it may be abated.

In small actions our rule is the same as that of the common law. The action must be brought in the County where the land lies, which is thought that the p^tff. should go to the jurisdiction & not in abatement.

That the cause of action had not accrued at the commencement of the suit, is another reason for abatement. This objection may also be taken by p^tff. to an action. It may be pleaded or abatement, because there is a defect in the writ. It may be taken advantage of by p^tff. to the action because it goes to the merits of the p^tff.'s claim. 2 Lev. 197. 160. 37. 105. 7 Hob. 199. 5 Evans 106.

And when this defect appears from the pleading, advantage may be taken of it by p^tff. however, or by a motion in arrest of judgment. 1. 23. 369. 70. 6 Ruth 114. 6 28. 325. 7 How 147.

I have now gone through all the enumerated grounds of pleading or abatement.

Now then

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As to the mode of pleading in abatement, and the effect of such plea.

Plead in abatement regularly begins and concludes to the writ or the case may be, to the declaration, as in the Bill of Misdemeanour, where the writ & dicta are the same.

Its conclusion is by praying judgment of the writ, & that the same may be abated or quashed. Indeed the plea regularly begins and concludes in this manner. There is to be sure a distinction taken between the form of the plea for an intrinsic and one for an extrinsic defect. In the former case it is said both to begin & conclude in the manner above specified; in the latter case that it only concludes in this manner. This distinction however is not at all regarded in practice. 5 Mod 132. 3 Bla. 303. Lawes 108. q. 162 — See 6 & 7. Abat. P. 121.

The plea I say regularly concludes to the writ, but not always, for where the plea goes to the person of the party the plea concludes by praying judgment whether the Defendant ought to answer. 5 Mod 134. new Ed. Lawes 109.

And where the writ is abated de facto, i.e. where it would be abated without plea, the plea concludes by praying judgment whether the Court will proceed from thence. Suppose then the writ is void & the Defendant pleads in abatement, he concludes praying if whether the Ct. will proceed further. Lawes 109.

It is said in Lucas Reports that the character of a plea is determined by its conclusion, without regard

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to the matter of it or the manner of its commencement.
This rule is the best, for upon the question what ought to decide the character of a plea in abatement, the rule ought always to be ⁽¹⁾ position; and the simplest is best, the above is the simplest. Lucas 112. L. Ray: 694. 12. Mod 52. 4 Bac 50.

But according to Ld. Holt the character of a plea is determined by the beginning & conclusion of it taken together. This is undoubtedly true, for the other rule only looks to the conclusion to determine the character. Laws 107. 145. 6. Ld. Ray: 593. Vide 584. 591.

But Ld. Holt lays down some further distinctions which are ^{but which are} ~~arbitrary~~. He says if the matter of the plea work be good in Bar, still if it begins & concludes in abatement it is a plea in abatement. Or if the matter pleaded be only in abatement, yet if the plea begins & concludes in Bar, it shall be so considered. And so if it begins as a plea in abatement & concludes as a plea in bar, it shall be deemed a plea in bar or a plea in abatement according to the matter of the plea & vice versa. Sir Ray: 593. 2018. 4 Bac 49. 6 Mod 103. 4 Bac 50. 12 Inst. 136. 3 C. & J. 281.

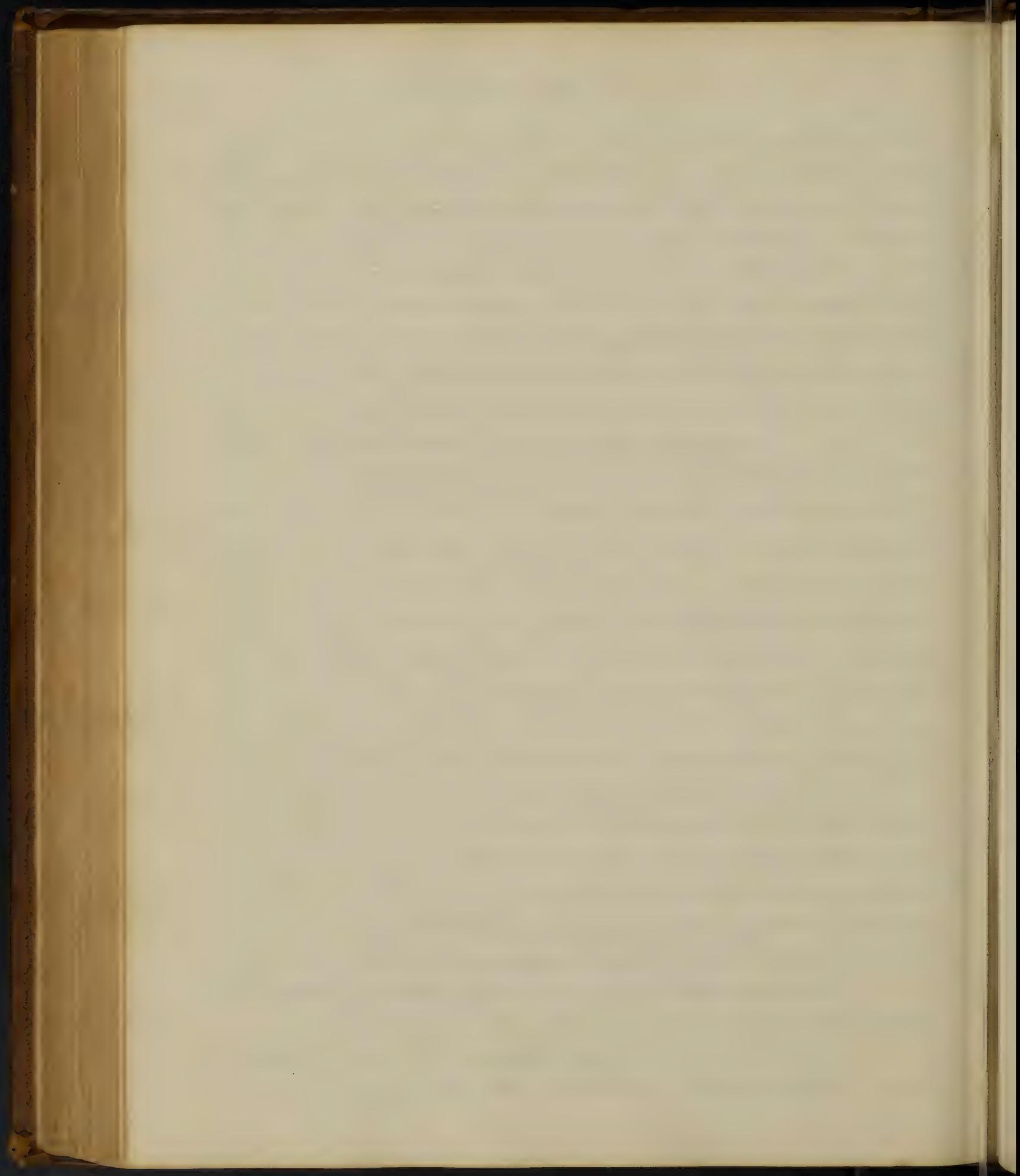
Further. He says if the matter pleaded go in bar or in abatement indifferently it is begins in Bar, & concludes in abat. or vice versa, the party may consider it as a plea in abatement or as a plea in Bar as he pleases, & answer it accordingly. The judgment upon such would be different in the two cases. See Statute of Frauds.

As to the forms of pleading see, 3 Ld. Ray: 11. 53. 27. 72. 107. 116. Laws Appendix

That a plea in abatement founded on matter (Donee paragraph)

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Pleads and pleadings.

which goes only in bar is not good, & so may not be a plea in Bar founded on or after which goes only in abatement of bar. The offices of the two pleads are wholly distinct. Inst. 128. 2d. 12. ch. 4. 100. 1 Mod. 24. 42. - 1 Blac. 14. 86.

But when the matter pleaded will go either in bar or in abatement the Party may plead it either way. Thus, alienage in a real action may be pleaded in abatement or in Bar. 1 Mod. 24. 44. 4 Blac. 50.

It is said by Ed. Cooke that duplicity is a fault in all pleads except dilatory pleads - but if a man may use divers of them in their proper time & place; and from this it has been holden, that a man may plead two pleads in abatement to the same cause, in the same part of the writ. That this is not the true rule, he cannot do it. True he may plead the several kinds of dilatory pleads in their proper order & this is the amount of the rule; thus he may plead to the jurisdiction, then the disability and then in abatement, but he cannot plead two of the same kind, as two outlawries, two excommunications. Duplicity is as much a fault in a dilatory plead as in any other. Laws 108. Rob. 252. 1 Inst. 304. 2 Blac. 15. 2 Inst. 8. 4. 16. 2m. 65.

When a cause of abatement is pleaded to judgment is rendered upon it, error lies upon it as well as upon a judgment in chief; but a writ of error will not lie until judgment in chief has been rendered, because the law will not allow a party to bring a writ of error where there may be perhaps no necessity for it, for he may succeed in a trial on the merits. But a more abatable defect is no

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ground of error unless it is pleaded. It is otherwise waived. 107 N. 766. 600 8544. March 12 1843. 38a. 151. Dec. Va. Introd. 5.

This is the case as to mere matters of abatement. But where there is an exception which may be taken in abatement ~~going~~ to the cause of action, one which may be taken advantage of in every stage of the proceedings, then the objection is not waived by not pleading in abatement & therefore a writ of error will lie tho there was no plea in abatement. As in the case of covt. lue., if not pleaded by the wife in abatement, it may be taken advantage of by the Husband at any time & error will lie if judgt. be rendered against her in Chif. Ld. Ray. 594. Stiles 254. 4 Bac 39. - 2 Nola R. 53.

And upon the same principle of waiver, it is an established rule that to a scire facias on a judgment the defend. is not allowed to plead anything which he could have plead on the former action. Falk 2. Cro. Eliz. 283. 575. 6o. 2d. 303.

and as a Declaration may be good in part and bad in part, so may a writ also remain good as to the residue. Lewis 106. 7. 2. Post T. 276.

Lecture XII.

Judgment on a Plea in Abatement.

As a plea in abatement does not regularly go to the merits of the cause, a judgment upon it does not regularly go in bar of a subsequent action for the same cause. One recovery by judgment by a deft. is pleadable in bar to a subsequent action for the same cause or judgment in chif or favor of a husband. is a bar to another action v^s. him for the same cause. This is founded on the idea

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that the merits of the cause have once been determined.^t This is the ground of the rule. But a judgment on a plea in abatement does not go to the merits of the cause. The real cause of the complaint is not regularly brought in question by a plea or abatent. ¹¹⁵ 4 Bac 29 note 460⁴³ 460⁵ 46. 8 Co 37. 98. -

But I give this merely as a general rule, for there are cases where a judgment on a plea or abatment is on the trial & goes to the merits of the cause. As alienage in a real action. This goes to the subject matter or dispute between the parties. Here a judgment on a plea or abatment may be intended in bar of a subsequent action for the same cause. vide supra. -

The judgment on a plea or abatment when rendered in favor of the plaintiff, that is of the defendant, is that the writ be quashed or abated, and this puts an end to the suit. It is true under the Stat. of Leofaile the self may offer another writ. This I have nothing to do with at present. The suit resumes when the writ is remanded. But I am supposing a case where there is no amendment. West 222. ²²² 1 Plow. 42. Bul. 112. -

But when judgment is rendered for the plaintiff on a plea or abatment, it is different in the two cases of a judgment on concurre to the plea & judgment on an issue of fact. 3 Bla. 303. 396. ⁷ 2 Wilts 367. 1 East 542.

If the plea or abatment is overruled by demurrer the judgment is respondeat ostrie, let him (the defendant) answer over again. This is an interlocutory judgment preceding the final judgment. 3 Bla 303. ⁵⁴²¹ 2 Wilts 367. 1 East

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If judgment is for the p^t. or on issue or fact formed by a plea or abatement, th. judgment is a judgment in chief "quod recipit," let the p^t. have judge. The new son & son is that such deft has obliged the p^t. to answer to a plea which was false & incurred costs, the deft. shall not be allowed to plead again. The judgment is a sort of retaliation upon th. defendant. 10 R 119. July 112.
2 Will 367. 13 Bac 15. 5 Ray? 594. 6 Bell 8. 236.

But in trials for capital offenses, this rule does not hold, as the criminal may have the privilege of answering over to the action, if his plea in abatement fails.

In Con. the rule is somewhat different from what it is in Eng. It is precisely the same when the defendant has judge. & where th. p^t. has judge. on a non-waver.

But where an issue in fact is closed by a plea or abatement, the distinction observed by our Court is this, If the issue in fact is closed to the jury, and judge. is awarded for p^t. judgment is in chief, if it is closed to th. Ct. & judge. is for th. p^t. the judgment is a respondeat ouster.

Mrs. Swift has laid down the general rule in Eng. but has not noted this distinction. 2 Swift 204.

The rule in Con. seems to imply that such issues here may go to the jury. But it would doubtless since we have a Statute requiring all pleas in abatement which are in the C^s. to be tried before a jury is impanelled, which implies that our Legislature intended that these should always be tried by the C^s. The universal practice is in this State to try them by th. Court.

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If that which goes merely in abatement is pleaded in Bar judge, is in chief, for the party will plead in bar, he must take the consequence of pleading to the action. L. Ray. 1020. 1 East. 634. 1 Dutton. 41. 1 Chitty, 9, 445.

And the plff. may if he chooses, have his writ abated, for if a plea in abatement is put in, which is true in matter of fact & good in point of Law, he may enter a "capitular breve" that is pray that his own writ may be quashed. Laws 108. Tid. practice 633.

It is an invariable rule that a matter of abatement in a writ is no cause of demurrer, that is, a deft. can never demur on abatement, since a demurrer only goes to the pleadings & has no possible connection with the writ, & the writ is never demurrable. The meaning of this rule is, that he cannot demur to any defects in the writ, & if he does, judge will go against him in chief. 1 Show. 91. Salk 220. Laws 173. Will. 410. 479. 6. Mod. 198. 7. 8. 9. 11. Bac 15.

In Flouden there is a precedent to the contrary, but the modern authorities have settled the rule as it is. Floud. 72.

But if a person prosecuted for a capital offence, should demur to a matter of abatement, judge would not go in chief & he w^t be allow^d to reply over. 2 Marsh. 334.

After a judgment of respondeat non est, a second plea in abatement cannot be received, for if he could plead another, he might as well two only. True if the writ is amended, it becomes a new writ & another plea in abatement may be made to it. Root. 126. 2 Saund. 406. 407. Root. 126. 407. 5. 6. 4 Bac. 51. Rule. 126.

It is a rule of the Com. Law that after a general

Pleas and pleadings.

imparlance, the Diffrnd. cannot plead in abatement. An imparlance is a continuance of a cause from one term to another.

After a special imparlance, he may plead in abatement, for this is one created in such a way, as to give the Diffrnd. advantage of all exceptions.

True, if the cause of abatement arises after a general imparlance, he may plead it. This is an exception to the rule; the ground of the rule is that after a general imparlance he waives the exception, but he cannot be said to waive an exception, which did not exist at the time of the act done. & if a fine sole be sued and the party an imparlance afterwards occurs, she may plead her coveture at the next term. 30 Bla 316. 4 B&B 93. 1 Inst 130.

And the rule is the same, that the Diffrnd. cannot plead in abatement when the time for pleading in abatement has expired. In Eng. the time is 4 days from the return of the writ. Lawes 3d. 5. Doc 7. Plac 297. Tidde 77. 7 Com. abat. 8.

In Cor. pleas in abatement must be made in the Sup. Ct. before the opening of the Ct. on the afternoon of the second day of the Court. In C. P. all pleas in abatement must be made before the impanelling of the Jury, which always takes place on the morning of the 3^d day of the Court. Stat. 34 & 1 Root 564.

But it may be observed that the rule in Cor. does not hold where the Law continues the action on the first day, as in cases of foreign attachment, where the Diffrnd. is out of the State. Then the Diffrnd. has no opportunity for pleading in abat. He has therefore the same time allowed him at the 2^d term, in ordinary cases, which he had at the first term.

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Matter of a batement cannot be pleaded after its rule for pleading it is out, unless it goes also in bar, & then it must be pleaded in bar.*

So if the matter is both in bar & a batement, it must be pleaded to the action, as *Covarione*. *q.v.*

Our former practice was to try pleads in abatement without a replication & then they were considered as determined. But the practice is now different, and they are answered as any other plead. *Hirby 49.*

Pleads to the action.

These are of two kinds,

1st. General Issue.....and.....2d. Special, please in bar.

I. Of the General Issue.

Issue in the law of pleadings is defined to be a single, certain, material point, issuing out of the allegations of the parties & consisting regularly of an affirmative or negative. And it is called an issue, from the etymological meaning of the word, being derived from the word "ex illo", going out, because an issue properly made puts an end to the allegations & closes the pleadings. *1 Inst 126. 4 Bac 54. 6 Inst 11.*

W. Gould thinks there is no necessity for the word "material" on the definition, as there really are no pleading, immaterial issues.

And according to the old rule of the Com. Law, there must be in all cases a direct affirmation & negation to form an issue. And so generally, is the rule at the present day, tho' it has been somewhat qualified, & therefore it may be laid down as a general rule, that every issue

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consist of a direct affirm. & neg. 1 Inst. 213. 2 Bla. 16. 1312. 8 Inst. 16. 278.

According to this general rule there is an issue out of one party wholly inconsistent with the averment of his opposite party not making a negative does not form an issue. Therefore, party pleads that at such a time S. S. was alive, & the other pleads that at that time he was dead, this is no issue; it shd. have been "that he was not alive."

But this rule has been relaxed in modern times, for where the pff. said that S. S. was born in France and the defend. pleaded that he was born in Eng. this has been decided to be a good issue. And there it is said by the Court that if the second affirmation is so contradictory of the first that the first cannot be true it would be a sufficient issue. This is extremely loose and I conceive the decision on principle cannot be law. It leaves to the discretion of the Ct. what ought not to be left. There is no chicanery in the old rule, & it ought to be strictly adhered to. 1 Wils. 6. Stra. 1177.

There is one instance at Com. Law where an issue is formed of two affirmations. In a writ of right the issue is always thus formed. The demandant declares he has more right than the defendant, & the defd. that he has more right to hold than the demandant has to demand. 3 Bla 305. 2 Stra 1177. ^{This is a simple case forming an established exception.} Issues are of two kinds, General or Special. 4 Inst. 54

According to Law they are of three kinds, General Special or common. 2 Inst. 110. He gives us but one instance of the latter kind, & that is the plea of non est factum to an action of Covenant Broken. - 1 Inst. 92. 3 Inst. 16. 2 Bla. 112.

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The general issue is a denial of all the material allegations in the defendant's declaration. He puts him upon the proof of the whole of his declaration. 3 Bla. 305.

A special issue is joined upon some particular part of the Declaration, or on some special matter alleged on the course of the proceedings. And every issue in fact, except a general issue, is a special one. 1 Inst. 126.
Laws 145. 5 b. v. 14 v.

No actions founded on any misfeasance "not guilty" is in general the proper issue. To debt on simple contract "nil debet" is the general issue. To debt on specialty, non *co-factum*. To debt on judgment "not due record". To an action of account "non baillif or receiver". To trespass "non assumpsit". To replivio, "non caput". To diffision "no wrong or diffision. To ejectment, properly so called, "not guilty". (Diffision is brought for an ouster of a tenant, ejectment for an ouster for a term of years.) To an action of warranty of a personal chattel, "non warrantia videtur". To debt on a penal Statute, "not guilty" is a good general issue, tho' "nil debet" is the appropriate genl. issue. The former is good because the action of debt arises by *delicto*. The deft. denies the offence & thus denies the indebtedness founded upon it. "Not guilty" was formerly held to be a proper general issue to an action of trespass on the case. Yet if the party pleads "not guilty" issue is now settled that it is not the proper issue, & the deft. joins instead of demurring, and verdict is given & a supplement.

Pleads and pleadings.

The pleadings are currid. 3. Mod. 824. La Ray? 1500. Co. Litt. 126^a.
1500¹⁴⁷ 3. Bla. 305. Esp. 167. 1st Rep. 462. Ser. 1022. 1 Ser. 142. 4 Chas. 84. Nov. 58.
1500¹⁴⁸ 1500¹⁴⁹

In debt for rent "nothing in arrear" is a good general issue, as being tantamount to "nil debet." Com. p. 588. 1 Browne 19.

In Com. the general issue to judgment is, "no wrong or dissension".

The general issue always contains the words "modoc form a", as then, the defend. is not guilty in manner & form "of".

The general issue refers always to the count or declaration and not to the writ. It is a denial of the plaintiff's allegations & the declaration contains the allegations. Therefore where the writ charges the Deft. with being receiver generally & the declaration charges him with being receiver by the hands of A. B. & now the defend. can only prove that he never was a receiver of the deft. money by the hands of A. B. because this is all that he has to traverse. Inst. 126^a.

A general issue regularly concludes to the country to be tried by the jury. This is not an universal rule at Com. Law for there are other modes of trying such issues. Sometimes the trial is by record, sometimes by certificate, inspection, waiver of law, &c. 3 Bl. 313. 15. 330. 4 Bac. 54. 1 Inst. 126^a.

According to the strict notion of the common Law the jury are not themselves the triers of any fact. They are merely the means by which the judges try a fact. They answer the same purpose as a record, where the fact is to be proved by a record & no trial record being pleaded. This is agreeable to the strict theory of the common Law. The Jury are the medium by which the judge is certain in the fact...

This.

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This distinction has been maintained, for in criminal law it is a settled rule that a man shall not be twice tried for a capital offence. Suppose the jury did not agree in the first instance, or one of them had died during the trial so that no verdict could be found, can he be tried by a second jury? The argument is that he has once been tried in jeopardy, & the rule is that no man shall be twice tried for the same capital offence. The answer to this is, the jury have not tried him. There is no trial till after a verdict. But if the Court have never been satisfied of the fact by a jury, they have never tried him. —

When not till record is pleaded, the plff. concludes with a reservation & not to the jury. The fact is to be tried by the Court & not by the jury. But here the issue is not closed. It is then closed by the adverse party's affirming over the existence of the record & praying an inspection of it. This shows that general issues are not always closed to the jury. Laws. 148. 2. St. R. 443. 2 Wilts. 113. 1 Bos. & Pol. 41. —

And on Cor. by a Stat. the parties may always close the issue to the Ct. by agreement. Stat. 26. 7. —

The form of tendering the issue in fact is this, where the Diffrd. tenders it, "And of this he puts himself on the Country for trial." If the traverse is on the part of the plff. it is this, "And this he prays may be enquired of by the Country." 30 H. 3. 313. 1 Inst. 126. —

But the issue is not yet joined: the other party then adds, the similiter; And the plff. (or Diffr.) doth likewise. Laws 147. —

In Eng. it seems the omission of the similiter, is

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In matter of substance & not aided by verdict. The Courts in modern times have evaded this rule by circumstances really ridiculous. In criminal cases the omission is mere matter of form. In civil cases, matter of substance, to avoid the rule, etc. will avail themselves of any thing to permit us an amendment. The rule may now be considered as a sine qua non, though perhaps it w^t be law. See 641. Corp. 407.

In Eng. it has been decided in the Sup. Ct. under the Paup. Ct. of Errors that the omission of the similitur is mere matter of form & aided by verdict, in the case of M'Intosh, Low & Babcock. This is precisely analogous to the English principle. - May 39^m.

Whenever an issue in fact is put to the C^t. the party tendering it must express on his plac that it is so put by the agreement of the parties. - Lecture XIII.

The issue always closes the pleadings & when well tendered on one side, must be accepted by the other. When the issue is not well tendered, the other party instead of joining may demur for that reason. 3 Bla. 314. 1 Inst. 125. 1 Inst. 88. 1 Paus. 338. Combe 86.

The words in "in manner & form" which are always used in tendering an issue are sometimes words of the substance of the issue & sometimes mere words of form. The Duke says he is "not suidly" in "manner & form" of i.e. these words sometimes traverse the particular form in which the fact is said to have taken place, and sometimes they do not.

The rule of distinction seems to be this; If the issue goes to the point of the claim, i.e. to the material

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allegations on the declaration, the words are mere words of form & of course do not traverse the particular form or mode in which the fact is alleged. Thus in assault & battery, the Plaintiff is charged with having assaulted the Defendant with swords, knives, & stars &c. The Defendant pleads not guilty & in 'manner & form' &c - these words are here merely formal & it is not necessary that the Plaintiff should prove that he was assaulted with swords knives &c. *St. 3172 Sundby Inst. 4 Jan 1710*

But where an issue is taken on a collateral point arising out of the pleadings, the words are of the substance of the issue, & therefore traverse the form on which the particular facts are alleged. Thus if the Defendant pleads a ferment in due, the Plaintiff traverses it modus et forma, because the traverse is the mode of form, & a ferment without due, cannot support the action and cannot be found by the Jury.
Bill. L. 483. Inst. 281. 4 13 a. 56.

This is an arbitrary rule & there cannot be any reason for it. I know of no exception to it however.

The true general rule seems to be, that these words do not take up issue the circumstances alleged as time place, &c. unless those circumstances were originally material & necessary to be proved as facts. Where they were material a traverse modo et forma will traverse the circumstances. *Laws 120.*

c. In an material issue is one taken upon an immaterial point, one which does not decide the merits of the cause. Any issue taken upon matter immaterial & important, & which its own substance is bad, is no

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verdict does not cure it. A reply leading is not allowed ⁱⁿ ~~in~~ ^{and} ~~the~~ verdict be found. 4 Bac 56. 1 D. 103. Cro. 8. 227. Barth. 37. 28.

An informal issue, on the other hand is one not rightly taken in point of form. It may be upon a point material & therefore it is not an immaterial issue. An informal issue, defective in form only is aided by verdict. The difference in effect between an immaterial and an informal issue is evident, for in the former case, the issue found does not discover for whom judgment ought to be rendered; in the latter the verdict cures the informality. 2 C. L. 137. 10 D. 19. Barth. 371. 2 Law 2319. 86. 3 Bl. C. 395. 22. 32.

An issue cannot be joined upon what is called on the laws of pleadings a negative pregnant or an affirmative pregnant.

A negative pregnant is some negative proposition which implies an affirmative. An affirmative pregnant is some affirmative proposition which implies a negative.

Such pleading is not bad in substance, it is cured by a verdict & the better opinion is, i.e. on special damages only. 1 Inst. 125. a. 303. Cro. J. 87. 312. 1 Bl. 445. 3 Bl. 201.

But such pleading is good when the negative or affirmative implied is not sufficient to maintain what is alleged on the other side. This rule tho' not so established by every judicial decision appears perfectly consistent with reason. Law 114.

The general issue covers the whole Declaration, so that under it the defendant may contest all the particular allegations. The gen. issue is not a distinct traverse of each particular fact in the Declaration.

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But then the general issue puts the whole declaration in issue, yet in some cases the general issue is proper to some actions or special contracts, where the facts laid in the declaration are not intended to be denied. This is the case where a contract is void this an absolute incapacity of the obligor. Then he may plead the general issue & support it by proof of the absolute incapacity. As where a female court is sued on a bond. She she executed the bond by putting her name & seal to it, yet, in the law being absolutely incapable of executing a bond, she may plead the general issue & support her plea by proving the incapacity. Don.
C. 37. Salk. 7. 2 Bla. R. 1082. Rec. Ex. 182. 12 Mod. 609. 6 Co. 311. 2 P. Wms. 145.

But if the deed is void in its own nature & not from any incapacity in the party to be bound by it, the general issue is not proper for the defense. As in the case of usury or any other illegal consideration. The law requires that there should be pleaded. No an action on deed usury cannot be given on evidence under the general issue. It contradicts the general issue for that is now ~~not~~ ^{proper} for the defense, whereas the defense is not that it was not his act of deed, but that some new matter can be alleged in way of avoidance. Suppose any other illegality in the consideration that must be pleaded to an action on the deed. This you observe is different from the deed of a female court, for in the eye of the law, she never did execute the deed, therefore non est factum is a good pleading to it.

And it is a general rule of the common law, that a specialty is made void by Statute, the special matter

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must be pleaded. It cannot be given in evidence without the general issue. As in the case of usury last mentioned, 116. 103 or 163. 560 119. Hob. 72. 2 Bl. 6. 292. Esp. 223. 2 Bl. 13. 1108.

and where the deed is only voidable & not strictly void, it is not competent for the defendant to plead the general issue & rely upon the defense. The defense would be inconsistent with the general issue, as in the case of infancy or duress. For to support the general issue of non est factum or the ground of an incapacity in the obligor, it is required the incapacity should be absolute. Esp. 223. 560 119. Hob. 72.

66. Pte. L. Ev? 162. Kirby 72. 3 Bl. Wor. 1805. 8ma 498. Hob. 166.

In actions based upon any deed, erasure, loss of seal, any alteration after the deed was delivered, and the want of complete delivery are all taken advantage of under the plea of non est factum. 560 119 art. 1160 27^o. Esp. 223. 4.

If such alteration or erasure be made by a stranger in an immaterial part & without the privity of the obligee, the deed is not violated. Therefore, in such case, the plea of non est factum is ill...

But if the alteration &c more in a material part, the instrument would be vacated, & if any alteration be made by the obligee or by his procurement even in an immaterial part, the instrument is vacated.

And in general it is true, that under the general issue, matters of fact only & not in matters of Law are in question. By matters of fact is meant, in matters of fact contained in the declarations, not that no question of Law can arise under the general issue, for many often do.

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This plea does not, in general, include other matters of defense arising from special matter. 1833.224.

It is a general rule of the law, that in ch. action of Indebt. Assump. any thing which shows that the Plaintiff has no right to recover at the time of Plea pleaded, may be given in evidence under the general issue. This rule or principle applies to no other action, & how far it applies to rescripts assumpsits I do not know. On this point I have never satisfied myself.

In Indebt. Assump. the rule is perfectly proper. The promise is a legal duty. Show any thing which shows that the legal duty does not exist, shows that there never was an assumpit or promise. Thus in Indebt. Assump. usury may be given in evidence under the general issue, because if there is usury, he never did in legal contemplation assume to promise. So defr. may be given in evidence under the general issue, for this shows there is no legal duty, & this is the only material fact contained in the declaration. Release or payment may be given in evidence, because they discharge the debt or duty. Per a. 498, 2 Burn 1012.
L. Ray? 287, 2 26. Bl. 143. Doug. 108. 3 Burr 1353.

But (whether) this rule is applied to rescripts assumpsits in Eng. (I know not) our writers lay down this rule, with reference to assumpsits generally. I believe the rule is intended to apply to Indebt. Assump. only. On principle it can only extend to special assumpsits. (Non est in debito, res ipsa responsum).

The reason given for this exception in pleading is, that ch. action is not strictus juris, & being an equitable. See Bul. 51 P. 512. 5th 140. 18. v. 147. 413. 60. 1. Ch. 1. 2. 19. 2. 8. Comm. 1800. 210.

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action any evidence which shows that the party ought not to recover is proper evidence under the general issue.

In indebt. a.sump. to the promisee there being merely a legal consequence of the duty stated, whatever extinguishes that duty, discharges the promisee.

Notwithstanding the rule above, the Stat. of Limitations, Tinter, &c. a.cord & satisfaction & Bankruptcy must be specially pleaded in an action of a.sump. sit. There are matters of Law which go not to the ~~get~~^{point} of the action, but to the discharge of it; i.e. they do not deny that there was once a cause of action. This is not always true in the case of Tinter, but it is, in any of the other cases. The Stat. of Limitations is as much a matter of Law & in the same sense as a release before mentioned. Chitty 198. Tidd 375. Esp. 147. 1 Gaura 283. 2d. 2. 3 Bac. 518.

In Lord Raymond it is said, a.cord & satisfaction may be given in evidence under the general issue, but the modern writers deny this to be law. La. Ray. 150.

The reason why these distinctions are taken, is not owing to any original mistake in the principles of pleading. The reason why these distinctions continue is, that in the case of release and payment they were made in actions tried on indebt. a.sump. & holden good under the general issue. In the case of Bankruptcy, Tinter, &c. they were tried in the first instance on estreps apts. & holden not to be good under the general issue.

In debt or simple contract the Stat. of Limitations

may

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may be given in evidence under the general issue. So may a release, for the defence does not contradict the plea. The debit is on the present time. L. Ray, 366.

Path 278. 2d p. 262. 5 May 18. 1 San 183. 122. 2. Sec. 215.

The great criterion, in order to determine when a given defence may be offered under the general issue, & when not, is this. If the defence is inconsistent with the plea of the general issue, it cannot be given in evidence under it; if it does not contradict it, it may. This rule you have observed is by no means universal.

In actions of assumpsit express or implied, damage of the state, of strands & properties may be taken under the general issue, tho' the party may plead it specially if he chooses. 1 Bro. Ch. 92. 2 Twifte 214. 18. 214

But this looseness of pleading which obtains in assumpsit, is not allowed in cases generally, not even in cases of torts any more than in actions on specialties. In torts he cannot give a release in evidence under the general issue. No of license or any justification.

elsewhere it is a general rule that a defendant cannot give in evidence under the gen. issue in an action of trespass, any matter of justification. It must be matter of verification or denial. 4 Blac. 60. Bul. ch. 17. 1 Inst. 282. 100 p. 478. 2 Rob. 174. 57

elsewhere it is an universal rule that any defences which cannot be specially pleaded may be given in evidence under the general issue. One thing however which cannot be specially pleaded, because it relates to the general issue. Law 111.

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In Eng. there is a very different rule from that of the Com. Law. The one introduced here by Stat. which extends to all actions is, that the Defence. may give in evidence any matter of defense. whatever under the general issue except some act of the Poff. which acquits the Def. from his liability. Stat. 34 &c.

The act of the Poff. here mentioned is some act which operates as a discharge of a right of action once existing, as release, accord & satisfaction, award of arbitrators, recovery in a former action. 2 Swift. 203.

An act of the poff. antecedent to the all-against cause of action & which operates as a justification may be given in evidence, as license. - Kirby 239.

To any other act of the Poff. which shows he never had a cause of action may be given in evidence under the general issue, as Dwif. usury, Infancy, Coveture &c.

It has indeed been decided by our Sup. Ct. that usury must be specially pleaded to an action on a promissory note. This is contrary to the true meaning of the Statute & the decision was reversed by the Pap. Ct. of Errors, June 1808.

The Stat. of Limitations may be given in evidence under the general issue. This applies in cases of torts as well as in cases of contracts.

It is said by Swift that the Stat. of Limitations can't be given in evidence under the general issue. in Eng. This is not. Law of the reason given does not apply under our Stat. Besides it does not apply in the case of Statute of Limitations. 2 H. B. C. 143. Doug. 108. 2 Swift. 215.

The

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The Stat. contains an exception before mentioned "of any act of the 3d of Feby. But on Book debt a release may be given or evidence under the general issue. The Stat. was not intended to prevent the party from giving in evidence which he c^d at Com. Law. Ed. Ray 566. Salt 278. 297. 298.

But it has been held that a release cannot be given in evidence in an action of indebt. affumps. under the general issue. This decision is incorrect, for this is a defense which may be made at Com. Law to the same action. The case was Brace & Cattlin June 1804.

The Defend. may instead of pleading the general issue deny any single traversable allegation going to the gist of the action, & conclude to the Court by. He ought to answer to the rest. This is a convenient manner of forming an issue, & is what is called a special issue. It is however seldom done. Inst 282. Tolv 195. Lawes 171. 2. 135. 112. 4 B. 602. 7.

A special plea reg. amounting to Lecture XIV.
the general issue is regularly inadmissible. A traverse of a single fact is not a special plea, because a special plea alldges new matter. The rule is made, because if such a plea were admitted, it would unnecessarily lengthen the record; and because it tends to refer to the old matter of fact which ought to go to the jury under the general issue. Thus in Truspass, the defend. pleads an alibi. This amounts to the general issue. He does not present any new matter which in its legal operation avoids the facts alledged. This plea does not admit the facts & avoid them; no, for it denies the Truspass. If a release has been executed, it will be a conclusion of law that there is no right of action.

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Of course it can be pleaded specially. But it is not matter of law whether the defendant was absent, out of the realm when the trespass was committed. It is mere matter of fact. 3 Bac. 201. 2. Cro. 2. vol. 2. 288. 329. 26 Ch. 127. Ep. 31. 11. at 249. 3182. & 309.

But to this rule there are some exceptions & some disputes in the Books how the defendant shall be taken advantage of.

In the first place. A special plea amounting to the general issue is good if it contains a special matter of justification, because the matter of justification is a conclusion of law & ought to go to the Court. In one certain cause of action the party may be justified as to some allegations & not guilty as to others. It may be proper then to unite the demurrer with some matter of justification. 3 Dux. 41. Cro. 278. 5 Bac. 202. 26 Ch. 27. 209.

Again. At the Commission on the actions of trespass, & before the defendant may plead specially what amounts to the general issue by giving colour to the plaintiff. If he only plead title in himself it will be the gen. issue & no more. 3036. 309.

This giving colour consists in alledging some figned matter in favor of the plaintiff's right of action, in order to justify a special statement of his own action. 1060. 90. Cro. 122. 3132a. 304. L. 11. 126. 150. - 513 re 2. 08.

But a special plea of title in an action of trespass is warranted by our Stat. because it is said, where there is a plea of title before a single magistrate, it shall go up to the Ct. under particular circumstances mentioned. Stat. title Trespass.

The Justices may in their discretion allow a special plea in Bar amounting to the general issue or some cause

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In this discretion is regulated by an established rule; and the rule as expressed is, that if the facts pleaded are such as may breed a scruple in the Law, & entitle the matter to be specially pleaded; that is if the facts raise questions of Law which ought to be tried by the Court. Lro. Eliz. 87. 4 Bac. 62. 63. &c. Mod. 274. 166.

But there is some contradiction in the Books as it respects the manner in which the Off. may take advantage of the defective plea.

In some of the Books it is said to be a good cause of demurrer. But how can this be, when the Ct. in its discretion may allow the plea. A demurrer must decide the issue of Law. The question is strictly juris between the parties & the Ct. have then no discretion. The plea cannot then be denied to. According to other authorities such pleading is not a ground of demurrer, but the ground of a motion to the Ct. that the general issue or nihil dicit be entered by the Defend. This I conceive to be the true rule. 1460. 95. 5 Bac. 202. Lro. C. 112. 157. Hob. 127. 2. c. Mod. 274. 5. Mod. 18. Hob. 127. 1. Inst. 303^b. 2. May 431.

But suppose the Court will not allow the plea on a motion by the Off. & they order the Defend. to plead the general issue, or enter a nihil dicit & he refuses (as they can not compel him) but joins in a demurrer. In this case I suppose judgment will go agt. him on the demurrer. In this way the difference in the Books above mentioned may be reconciled. The regular way is to move the Ct. for the gen. issue of as above stated, but if the Defl. refuses to the judgment go agt. him on the demurrer.

pleas and pleadings.

It is said, & correctly said, that after the Court have disallowed the Plaintiff's motion & ordered the Defendant, who has general issue & he refuses the Deft. may take judgment by nil dicit? You see then he is not bound to demur. ¹⁰⁶⁰⁹⁴ Bac 207. ¹⁰⁶⁰⁹⁴ C. & A. 185. 519.

In Eng. it has always been the practice to demur specially & takes judgment in chief upon it, probably 2 Day 431.

But there is a very material difference between a special plea amounting to the general issue & a special plea alledging facts which in evidence would support the general issue, for the latter does not necessarily amount to the general issue. Thus a release to the Defendant on simple contract is pleaded; this is good pleading, yet it would support the general issue. So of coveture, defrayment and usury tho they all support the general issue by being given in evidence under it, yet pleading coveture etc is not pleading the general issue. Chitty 197. 8. Park 394 & 5 Mod. 18. L. Ray: 88. 9. Comyn 356. - Laws 112.

The specific difference between these pleas may be easily seen. A special plea amounting to the general issue is one which contains a special statement of facts contradictory to the allegations in the declaration.

On the other hand no plea in general which admits that there was once a cause of action, or which admits the allegations in the declaration amounts to the general issue. The facts pleaded might indeed be given in evidence under the general issue, but they do not amount to it. The general issue is a denial of all the allegations in the declaration. As in the case of a replevin specially pleaded. It may be given in evidence under the general issue.

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The general issue to debt or simple contract, but it admits that there once was a cause of action, & therefore when specially pleaded does not amount to the general issue, because the general issue denies there ever was a cause of action. Go. of covtiture, in sancy 1. Ray 288. q. 366. 787. Cro. C. 871. Chitty 197. 8. Bath 183. Salt 344.

According to the distinction it is customary in Eng. to plead specially other defences than those originating from "the act of the ptef." in actions on contracts.

There is another kind of plea necessary to be noticed. I mean a plea stating special facts which go to prove the general issue & conclude with the general issue in point of form. It is in fact the general issue, and not a special plea amounting to it. Thus to an action of debt on Bond, the Df. may plead that the deed was delivered to A. S. as an escrow to be delivered over to the ptef. on a certain condition, which condition has not been performed by the ptef. & therefore it is not his (the Df's.) act & deed in manner & form as is alleged. In the case of courtiture this was constantly the manner of pleading the general issue, under the ancient rule requiring it. 10. Eliz. 164. Salt 279. 11. & 12. Hen. 8. 66.

This is the general issue with an affant from the manor word affant, so, because the affant precedes the general issue in form.

And it is remarkable that there is a contradiction in the Books as to the manner of closing the plea. Some of them say it must close to the Country & some say, may conclude with a verification. Every definition shows that it must conclude to the Country. If it con-

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concludes with a verification it is not the general issue with an ifpart. It is concluded by the general issue that the Difend. may have the facts go to the Country. If it concludes with a verification it is ipso facto a special plea amounting to the gen. issue which w^t be bad.

To the conclusion to the Country you may see Plow. 66. Note 2^o Bac 62 note 84. 3 Rule 26. Esp. vi 222. Stark 274

As to the verification see Gil. Ev. 164.5. May 112. Atk. 302.

As the Law now stands the Difend. is never obliged to plead in this way. When ever he can plead in this way, he may plead the general issue in its most general form. The only advantage to the Difend. is that he can state a question of law on the record which would otherwise be混tive with the question of fact. It is in general more useful to the p^t eff. than to the Difend. because it shew^s the special facts which are relied upon as defence & confines the evidence entirely to those facts. Gil. Ev. 163. 164.5.

And it seems that the plea may be directed to the it concludes to the Country, because the conclusion is made from facts stated. And if these facts will not support the general issue it ought to be demurred to. The question is however doubtful; there is very little said in the Books. In fact the general issue in its most general form may in its nature be demurred to, tho if properly pleaded the demur^r must be overruled. Gil. Ev. 164.5.

I observed that this was anciently the mode of pleading in the case of Courtures. Anciently if the specialty was void by reason of something extrinsic as Courtures,

I Pleas and pleadings.

or became void by reason of something ex parte facts, as rare as the Defd. was not allowed to plead the general issue except with an affidavit. This is not now the case. In and Ld. Holt says, all special non res factions are ^{See also 21 B.} impudent because they subject the Defendant to the onus pro bandii. Thus far of the General issue.

III. . . . Of Special pleas in Bar.

Pleas to the Action of the second kind are special pleas in Bar.

A special plea in Bar is usually defined to be, one which admits the facts stated in the declaration & avoids ^{Laws 37. s. 115. 124.} them, i.e. contains some matter in avoidance of the 4 Bac 2.

But tho' this is generally it is not universally true, for a plea in Bar does sometimes traverse some part of the Declaration. Thus if in Trespass the Defd. pleads a release, he must traverse that he has committed any trespass subsequent to the release. Hob. 104. 4 Inst. 70. 620. Eli. 30. 418. 2 Ann. 116. 126. 121. 118. 148. 2 Inst. 79.

And indeed there is a species of special pleading, or rather one defined pleaded in the form of a plea in Bar which does not admit the facts going to the gist of the action; & this is the defense of an estoppel. C. Laws 146. 153. 161. 172.

An estoppel is some matter of record, or some writing under seal, which prevents the party from pleading a particular fact. It precludes the party from averring the fact admitted in the Decl^a. This is a plea in Bar, but does not admit any of the facts stated. C. Laws 88. 130. 140. 3 Bla 308. 3 East 346. 11 Inst. 13.

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After all, I do not know any more adequate definition of a plea in bar, than can be given.

A plea in bar however does regularly admit admissible facts which are not traversed by it, and is always an avoidance of the things not traversed. *Salk. 91.* *4 Bacon 273.*

But tho' it is generally true, that a plea in bar admits all traversable facts which are not traversed yet every plea of justification must expressly confess the fact intended to be justified, because it is said to in absurdum to justify a fact which he does not confess. *See ~~no new matter~~ 3 Bla. 318.* *1 Saund 14-3. 28-1. 32. 298.* *Salk. 394.* *Barth 380.*

Lecture XV.

A special plea in bar always alleges some new special matter, & therefore it is called a special plea in bar. This distinguishes it from the ordinary general issue which alleges no new matter.

This special matter is usually in the affirmative but it is not always, for if an action is brought upon negative covenants, if he would plead that he has not broken the covenants, he must plead in the negative. *3 Bla. 309.*

This plea as it alleges new matter must regularly conclude with a verification instead of closing with a counter. This is the established mode of keeping the pleadings open. As long as new matter is pleaded the adverse party must have an opportunity of answering it. *2 Burn. 772.* *3 Bla. 1725.* *Davys 158.* *6 Comp. 575.* *1 Saund 103 n. 2.* *3 Bla. 2309, 10.*

There is indeed, introduced by Stat. in Eng. a special plea

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plea concluding to the country, & this is the plea of Bankruptcy. It is called the general plea of Bankruptcy. The Stat. 5 & 6 Geo. II. allows the defend. to actions on contracts to plead the plea of Bankruptcy specially & conclude to the country. Laws 14 & 5. 22 & 4. 22 &. This is an anomaly in ye Law.

What a plea which is merely in the negative and not concludes with a formal verification, since the party taking the negative of the issue is not to proved, & therefore it would be absurd for the party to conclude in this manner "and this he is ready to verify" off when he is not to verify it. * Willes 5. Laws 14 & 5.

As a general rule, a special plea admits, as of course, what it does not deny. Hence nil debet is no plea to debt or bonds, because the plea of nil debet does not deny the execution of the instrument or duty and as it contains no new matter in avoidance it is not a special plea. It therefore admits a right of recovery. Hard 33. 332. 4 Blac. 83.

There are some general requisites to be observed in every special plea.

Lord Coke's general rule is, that every deft. must plead such a plea as is pertinent & proper according to the quality of his case, estate & condition. This rule is so general that we get no adequate idea from it. It amounts to this, every one who pleads, must plead a good plea. 1 Inst. 285. 303.

But there are rules more particular.

1st. Every special plea must contain issuable matter, i.e. it must consist of such matter as that an issue may be taken upon it. Otherwise the opposite party could not

(See supplement p)

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traverse what is alleged, because what is not passable is not traversable. In fact if it is not passable it is not traversable. 2 Wils 138, 94. Lams 137, 8.

and every special plea in which fact & law are so blended that they cannot be separated if ill. The matter raising the question of law ought to be separably, & substantially pleaded that it may be separated from the mere matter of fact. Thus in trover for goods of the defendant. Should plead that he is lawfully entitled to the goods of all felons & then aver that these were the goods of a felon, this plea w^t not be good in the first part of it, for the traverse w^t be that he is not lawfully entitled, and the questions of law & fact would go together. He should plead the special matter of fact which constitutes the lawfulness of his claim & not plead so generally as in the case supposed. Laines 188. qd 24^o

2nd. Another very important rule is that the plea
in Bar^{is going to be whole Recitation} must cover the whole of grammar or cause of ac-
tion or it is ill made only as to that which is omitted, but
in toto.

Thus in an action, for an assault, battery and wound-
ing, of the Plaintiff. Should he plead a justification for the assault
and battery only, the plea would be bad in toto and damages
might be recovered agt. him. on the whole declaration. The
Law will not allow the Defendant to take a limb of the de-
claration. He must answer the whole or none. The plea
must cover as much ground as the declaration does.^{*} (See
note respecting parvus et prolixus p. 7. 7) Hob. 104. 1 T. Rep. 630. Lawes.
136. 1 Lawes. 28 note. 31 Lawes. 127. Lono E. 268. 3d ed. 370. Hob. 327. 328.
¹⁷¹
(* See supplement, t.)

Pleads and pleadings.

So in an action of Trespass; if the Defend. pleads a release for a trespass once committed on a certain day, he must traverse all other trespasses for the p'tf. may prove any one of a hundred committed before the suing out of the writ.

So also to an action agt. a Bailee for goods delivered to him to keep & carry &c. pleaded that he was discharged from the duty of carrying but said nothing about the obligation to keep, the plea was demarable because it answered only a part of the gravamen. Roll. 28. 413 ac. 88.

So in an action of Plunder when the words were "the is a thief & has stolen 20\$" a plea that she was a-f^d & had stolen 2 dollars f^d was not good. l. 1670. 2. Roll. 414.

By this rule it is not required that the Defend. in one plea, should make an answer to the whole declaration. He may plead not guilty for instance, as to one part and a justification as to the rest. He may traverse a part, plead in Bar to a part, & dismiss to the rest. But all his pleas taken together must answer the whole gravamen or cause of action.

The same general rule holds as to all the subsequent pleadings. The whole gist or substance of the plea or Bar must be answered. So the replication, rejoinder &c. must all be substantially answered or the plea will be defective.
1 Faund 28 note 1 T. Rep. 40, 2 Sand 123. (403 inserted by Sup. by mistake)

With regard to pleas not answering the gravamen or cause of action, this distinction is to be observed.

If the plea imports to be an answer to the whole, & is in law a good answer to part, only the p'tf. may demur because here it is an answer to the whole declaration, but an insufficient answer. 1 Faund 28 note

Ideas and pleadings.

On the other hand if the plea imports or begins as an
answer to part only it is a discontinuance & the plaintiff
should not demand but take judgment by nil dicit.
^{See 200}
3 Galk 179. 5. May? 231. Stra 303. 1 B. & W. 427. 4 Co 62. 2 Wms 130. 6.
^{See 200}

He is said in some of the Books that if the plea imports an answer to part only, when it was good as to the whole, it should be demurred to. But this is not different from the other case. I conceive it would be proper in this case to take judgment by trial alone. It makes no difference how good his plea may be in substance, if it only imports an answer to part.

et justification or any other defence which answers
the q[uo]d of the action covers all matters of aggravation,
therefore is an answer to the whole declaration. This is a
defence which satisfies the rule.

This is trespass for breaking & entering the poffhouse
& expelling the poff. therefrom a plea which justifies the
breaking & entering only is good for the expelling the poff.
is more matter of aggravation. Such a plea is always a
good answer to the declaration; it may not be to some
other parts of the pleading, for there may be what is call-
ed a moral assignment. 17 R. 636. 176. 136. 555. 5 Bac. 213. Lawes 70. 163. 240.

A novel or new assignment is defined to be a more particular statement on the replication of what is stated more generally in the declaration. It is in the nature of a new declaration. *307 R. 292; 18 ibid. 679, 634; 3 Bla. 311; 3 Wilts 20.*

Suppose that the action before stated of trespass.
The deft. is about to rely on the separation as a distinct

Actions and pleadings.

trespass, & a substantive ground of recovery. He may do it by way of new assignment, which makes it a new declaration. —

As it has now become a new declaration the Dif^d. may plead to it as such; i.e. plead not guilty, or any other plea which he might have pleaded had it been the only thing contained in the Declaration. Laws 165. 240. 1 Sand 299. 3 East 294.

You will perceive the office of a novel assignment is to take out of the plea in Bar, or the defence which the dif^d. makes in his plea in Bar what upon the face of it, it is a good answer to, or in a single case (only) last cited of trespass, it is to transform what appears to be only matter of aggravation into matter of action. Not always so. The novel assignment must always contain an averment that the trespasses contained in it are different from the trespasses mentioned in the plea in Bar.

It is to be observed further, that the averment in the novel assignment cannot be traversed, for in such a case as this the Dif^d. Should plead the general issue "not guilty," & unless it appears in evidence that the trespasses are distinct, the novel assignment cannot be supported, & the Dif^d. will prevail upon his general issue.

1 Sand 299. notes (Laws 241. 164. 5.)

It was anciently necessary for the Dif^d. to set forth specially all the particulars, however numerous they may be, of any defence consisting of special matter of avoidance. 1 Inst. 303. 8. Co 133. 4 Bac 90. 15. R. 753.

But now general pleading is sometimes allowed to avoid prolixity and the rule is as expressly broken as when the particular facts containing the defence, if specifically set forth would tend to infiniteness, i.e. to great prolixity.

Pleadings, pleadings.

Prolific general pleading is allowed. Where a man is bound to perform covenants containing a great variety of acts he may plead performance generally. He need not plead all the particular facts, when it is manifest that pleading thus would tend to great & inconvenient prolixity. Cro. C. 749. 916. 1 Sid. 215. 2 Inst. 256. Corp. 575. Laws 601.

As if a Deputy Sheriff giving Bonds to serve all writs, should be sued on there for omitting service he may plead performance generally without naming any particular writ, tho' the defense consists of matter in avoidance only; for otherwise it would be impossible for him to plead well.

But the general plea of performance cannot be pleaded to an action of covenant where some of the covenants are negative; because it is said negative covenants cannot be performed. He may plead performance as to the affirmative covenants, but not as to the negative ones. He must plead that he has not performed the covenants which he covenanted not to. If he pleads performance of negative covenants, it is manifestly a formal defect. It can be taken advantage of only by the crafty Plaintiff. Cro. C. 691. C. p. 305. 1 Inst. 303. Cro. C. 232.

* It is a general rule that repugnancy in a material point violates the plea. But repugnancy in an immaterial point does no harm. It is considered as mere surplusage to come under that description. 2 East. 333. 1 Inst. 303. 2 Inst. 332. 333.

By surplusage thus is meant, foreign matter, or repugnancy in a point immaterial. Thus suppose the. P. S. should state in his declaration that on the first day of Nov. 1812. he lost his goods & on the same day they came into the hands of
(See Supplement W.)

Pleas and pleadings.

the defendant. who on the first day of October in the same year
convened them; this would be the case on general demurrer, for this
day is a point material. 2 East. 339.

But if he had said "affernwards on the 1st day of Octr." this
would be good after verdict & the words 1st. of Octr would be
rejected as surplusage.

As to the form of beginning & concluding a Plea in Bar,
see Lavers 138, 145, 159, 161.*

Lecture XVII.

Of Traverse.

There are many things to be considered which re-
late to Pleadings in general. And first of a Traverse.
This does not come under any general division. It is by
itself.

A Traverse is a denial of some particular point in
the pleadings & always tends an issue. There is indeed a
particular kind of traverse which itself forms an issue, but
this is not now to be considered. The general rule is, that
every traverse tends an issue, & this traverse may relate
tho' to any special matter alledged on either side. All
new matter alledged is the subject of a traverse. So an
traverse may be taken to any part of the pleadings
including the Declaration. It may be taken to a part
of the Declaration, to any dilatory plea, or to any spe-
cial plea in Bar. It cannot clearly be taken to the general
issues. 1 Inst. 282. 4 Bac. 67. 3 Eliz. 195.

It is usually taken with the words "absque hoc,"
In English "without this".
(* In Supplement 10.; — * In Supplement 10.)

See 12

Pleadings and pleadings.

It is said by Bacon that a traverse when properly taken "closes" the issue. 4 Bacon 67. This as a general proposition is clearly incorrect. This formal traverse which is taken with the words *absque hoc*, which is the only form of a technical traverse, does not necessarily close the issue, but merely tends the issue, & regularly closes with a verification; but a verification is never the form of closing an issue. 6 Co. 24. 2 Wm. 121. 87b. 18 Will. 321. Doug. 4 12. 5 Con 199.

This supposed rule, placed in law that A. S. did seize in fee & thus denies till thro him. The party replies that he did seize on land, "without this" that he did seize in fee. This is a formal technical traverse, but this traverse does not close or even tend the issue, but merely tends it. The issue is thus formed by the defendant replying, over that A. S. did seize in fee, in manner & form as he had above alledged in his plea or bar.

These words *absque hoc* are words of strong denial on the law. They mean (as in the case above mentioned) that A. S. did seize on land & therefore that he did not seize in fee is excluded.

But these words, *absque hoc* are not absolutely necessary to constitute a traverse, for it is settled that the words "*et non*" will answer. Yet they are almost always used & contain a denial of what is alledged on the other side, but not such a denial in such a form as to close the issue. 1 French 114. 2 W. 16. p. 30. 2 Wm. 119.

It should be noted as a general rule that a technical traverse, i.e. a species of traverse, concludes with a verification.

Pleads and pleadings.

But a general traverse which reaches the whole of what is alledged on the other side, concludes regularly to the country. Thus from the replication "de injuria" of the conclusion is to the country. The defend. to an action of assault & battery pleads "Son a paule domine". There is a general traverse going to all this defense. It is in these words viz., "de se pro prias injurias absque tali causa". These words are a general negation of the whole defense pleaded, & the traverse concludes to the country. 4 Bacon 67, 68. Doug. 90. Gal. 4. 2 T. Rep. 439. 1 Bost. Pl. 76. Doug. 412. 1 Law 1036 n. 3. 8 Cobb. 2 Hawk. 364.

Now it may be asked what is the reason why a special, i.e. common traverse should conclude with a replication of a general traverse to the country. For ch. four or there are two reasons. First. It may be immaterial if it is the other party is not bound to join it, and if not bound to join in it the other party ought not to conclude to the country. The pleadings should be left open that the party agt. whom the traverse is made may abandon it if he has any good reason. Secondly, In certain cases where the traverse is material, the other party may abandon it & protest by altogether, & take a traverse himself upon the instrument, which he could not do if it concluded to the country. Then how a special traverse should conclude with a replication?

But in the case of a general traverse these reasons do not exist. In the first place it certainly cannot be immaterial, because an immaterial traverse, is a traverse of an immaterial part of a good declaration or plea, but a general traverse, reaches the whole of what is alledged.

Pleas (and) pleadings.

consequently it reaches the good as well as the bad. Now
if, in such a case it is impossible that such a general tra-
veller should be abandoned, because as the general trav-
eller reaches the whole in utter allusion, the Party cannot
abandon the subject of this man's, as it were, whole
whole defence which he has plied, without being guilty
of a departure. Jan 15 2.54.

The words *current*, *transpiration* as they relate to the conduction of a fluid are used as synonymous.

It is said however by Waller who was an eminent
spec. &c. pleader that a general traverse may in many
cases conclude either with a verification or to the court
by, because says he "so are the precedents." Now a special
traverse never can conclude to the court by. There is no rea-
son why a general traverse should conclude with a veri-
fication. The pleading must ^{be} founded on the
principles of pleading requires it. And as the general
traverse reaches all the facts in the case, it clearly is the
proper time to close the issue. The principles of pleading
in the case of a general traverse certainly do not require
to be left open, but so is the law, that they may be. 3. T. B. 463. 2. B. 1022.

As in the case above stated, where Profane, to annoy
or vex his pliads, son assault, damage, &c. The Prof. divides the
whole by a general traverse. He may conclude with a ver-
ification to the country, what sum is due, in granting this
liberty. The prof. cannot, however, do it, or alledge any, material
error. There is no reason in it. But in every case a general traverse
cannot conclude either way. It is only in those cases, where it has
been allowed, for in no others do I think it would be.*

Pleas and pleadings.

A technical traverse, that is consisting of the word "absque hoc" differs from a direct, & positive denial, of a fact not only in its diction, pharology or form, but generally in its conclusion. Where the traverse is a special one, it always differs on both; where it is a general one it differs only in form and not in conclusion. 41 Inst. 67, 77. Roay. 78. 1 Ban. 321. Lanes 116. 149. 2. 1. R. 439.

And this direct & positive denial of a fact is preserved when the party tendering the ipsa does not find it necessary to introduce any new matter. Thus where one defendant pleads in abatement that one defendant is dead. The pef. replies that he is alive absque hoc, that he is dead. This is a technical traverse but instead of this the pef. may reply that he is not dead & put himself directly upon the Country. Thus again, the 1st. part. pleads an account & satisfaction. The pef. replies some new matter & concludes with a technical traverse. But if it is not necessary to add any new matter he may reply that it was not accounted for & concluded directly to the Country. So you see this technical traverse differs from a direct and positive denial in form.

It differs also in conclusion; for a direct & positive denial must conclude to the Country, but a special traverse always concludes with a verification. -

Thus on trying after the defendant has pleaded it, the pef. may reply that the contract was made on good & lawful consideration of (stating what it was) absque hoc, that it was done there, compactly agreed of:

(But he is not bound to state the consideration of but

Vicarious pleadings.

may deny the party's allegations directly & positively & then he must conclude to the contrary. But if he elects the first mode, he must conclude with a verification, because he alleges new matter in stating a good consideration.

This mode of traversing a particular fact by way of positive & direct denial obtains only where you give some other answer to the rest of what is alleged on the other side. - 2 Sand 206. 207. 1 Sand 103 art. 2 Burn 10th. King p. 98.
2 Barn 871. Laws 116 to 118. 149. 2 3 N. 439.

It has been a subject of much controversy in the Books, whether a wrong conclusion in these cases is matter of form or matter of substance. It has already been observed that in general, a general traverse should conclude to the contrary. And suppose when it ought manifestly to conclude to the contrary it concludes with a verification, is this a defect in form or substance? There is very little said upon it in the Books. In Sir T. Ryfford p. 94. it is said to be a defect in substance. In another case in Burn 240 t. 6. it appears a double whill, & it is a defect in form or substance, i.e. whether it is in general or special damages. I confess on principle I see no difficulty in settling this question & there never would have been any if the science of Proceedings had always been understood, as a collection of principles. In my opinion it is only a defect in form, for the objection is not that the party has not traversed all that is necessary. It is that he has not concluded his traverse properly. He has pleaded what is sufficient for his purpose. He has only failed to plead properly. And therefore think it is only on special damages. Cro. Car. 117. 164. It is now settled by Stat. 4 & 5 Anne to be in form only. A demandage is to be taken by Spec. Damages only. as to the debt. See 1 Law 103. 285 N.S. 2 Sand 100 art. 18a. to anno. 2 94. 5.

Pleasance, pleadings.

I have observed that there are two modes of denying an allegation. 1st by a technical traverse, 2nd by way of positive & direct denial. Further, when an allegation on one side is expressly denied on the other by way of direct & positive denial, a formal traverse superadded to this denial is made less improper & demonstrable. If it might be done, parties might deny directly & traverse indefinitely! Thus plf. avrs. performance of a condition precedent. Defnd. pleads that he has not performed the condition of "without this." That he has performed of this traverse is improper. To suppose otherwise, right of action is to accrue when he attains the age of 21 years. Plf. then avrs. in his declr. that he has attained this age. The Defnd. pleads that he has not attained this without this that he has attained to the age of 21 years. This traverse is demonstrable. The party who denies expressly, should have concluded directly to the contrary. *2 Inst 871.*
Laws 117. Cro. Elyz 155. 1 Inst 1701. Roop. 98.

Thus far I have endeavoured to shew the general nature of a traverse with the manner of its conclusion. I shall now consider when it is necessary to take a traverse and when not...

Under this head it is a general rule, that when one party alleges new matter inconsistent with any antecedent allegations on the other side, but which does not form an issue, upon whom a traverse of these allegations is not only proper but necessary. There can be no traverse with words of denial, but when a man alleges new matter merely inconsistent with what is alleged on the other side, & does not form an issue, it is not traverse. *Cro. E. 30. Dyer 365. 1 Inst 253. 1 Inst 22. 3 Bla. 6. 310.*
Laws 117. 118. 119. 120. 1 Inst 100. 2 Inst 207. C. note 4. 209. note 5.

Pleadings and Proceedings.

This suppose one Defendant pleads that at the date of the suit, his Co-defendant was dead. The Plaintiff merely replies he was alive. This is bad pleading. He should have replied, that he was alive, without this, that he was dead. And the issue is not regularly formed by his affirming that he was alive. There are two affirmatives. I suppose there is no inducement necessary in this case. We might have said that he was not dead by way of direct opposition, and then have formed the issue.

Again, Plaintiff pleads that J.S. died seized in fee. The Defendant pleads that he died seized in tail. This is bad pleading. He should have added absque hoc that he died seized in fee. Therefore the rule is general tho' not universal that where one party alledges now matter inconsistent with the allegations of the other side, but which does not form an issue upon them, he must supersede a Traverse.

The new matter in this case which precedes the traverse is called the inducement to the Traverse.

As in the case above - the Defendant pleads that J.S. died seized in tail, absque hoc that he died seized in fee. This new matter preceding the absque hoc is the inducement, that which follows from the absque hoc is the Traverse itself.

The object of the last rule is to compel the parties to form an issue on what each alleges inconsistent with what has preceded.

But the rule that there must be a direct affirmation or negation, has been relaxed in modern times.

It is written the Plaintiff avowed in his Declaration that J.S. was born in Eng. The Defendant pleaded that he was born in

Plaint and pleadings.

in France. The C^t. held that this was issue enough.

And a rule like this seems to be laid down by the C^t. that where that which is affirmatively alledged on one side is so inconsistent with that is affirmatively alledged on the other, that the first can on no score be true, there is no matter whether there is a direct affirmation or negation or not. This is a deviation from the rule and is an unfortunate decision. *Melsb. v. Stra. 1172.*

This general rule that where a Party alledged new matter merely inconsistent with the allegations on the other side, if not forming an issue up on them, a traverse is necessary; does not hold when the Party who alledged new matter inconsistent with the allegations on the other side takes the burden of proof upon himself, i.e., when he alledged some affirmative matter which he is bound to prove & bound to prove in the precise manner, in wh. he has laid it..

As in an action of debt, if the D^f. rely upon the fact of payment he must alledge it specially & he has *a quo modo*, time, place, sum, & acceptance by the p^t. All this he must do & all this he must prove..

Again, in a Bond given to a Judge of Probate, one condition is that the adm^t under an account. The p^t. alledged a breach that the D^f. had not rendered his account. The D^f. cannot plead that he has rendered his account, a *bona fide* hoc that he did not render, or else he has rendered his account, & conduced to the country. He must plead this specially, leaving every thing open. *Laws 150. fol. 233.*

Plausive pleadings.

But when a party merely contends to avoid by matter what is alleged on the other side, a traverse is not necessary nor proper. It would amount to a repetition. What he has alleged is not in point of fact inconsistent with what is alleged on the other side, & therefore a traverse is not necessary.

Thus suppose an action on contract the Defd. pleads infancy. The pft. upholds a promise after full age. The pft. cannot here traverse the plea of infancy, allege hoc that he was under age, for he has once admitted it. So thou sees the matter must conclude with a verification without a traverse. 2 Mod 168, 3 Bl & C. 309. Crost. 221.

Again, the Dfnd. pleads a release of the cause of action. The pft. applies per francor. that it was obtained by fraud. He cannot traverse the fact that there was a release, for he has implicitly admitted it, by alledging it was obtained by fraud. 2 Mod. 384, 2. 602 168.

Where a formal traverse is made (as with an allege hoc) with a verification the issue is joined by the opposite party's affirming over what is thus traversed & concluded to the County. As pft. upholds that J. S. did seize in fee in manner & form as if. and of this he puts himself on the County. A special traverse then leads to an issue by the opposite party's affirming over what is thus traversed the special traverse dismisses. Saltk 4. Inst. 128 L. 249.

Lord Cooke lays down a rule on this subject, wh. is very badly expressed & which for a long time I could

Pleads and pleadings.

not understand. It is this. That an issue joined upon an allege hoc ought to have an affirmation after it. It means the allege hoc ought to have an affirmation after it... As I. S. died seized in tail without this, that he did seize in fee. The meaning here is that the negative cannot be traversed with an allege hoc. The common rule of traversor will not permit it. The words allege hoc are a strong negative & therefore to follow it with another negative would be to say, that I. S. died seized in tail, without this, that he did not not die seized in tail... 1 Inst. 12.6^o Somers 121.

And it never can be necessary or even convenient, whence the privilege^{claiming} negative with an allege hoc. In the party is bound to alledge & prove his new matter per modum...

It has been a question whether the omission of a traverse when necessary is matter of substance or in alter of form. The opinions are contradiction. I concur for reasons given before that it is matter of form only, for if he has pleaded a sufficient inducement to a traverse, & has not concluded it with a traverse, he has always sufficient, & the defect cannot therefore be a defect in substance, but only in form. 18 Com. 43.4. form 20 Mod 60. submod 10. 1800.

If a Diffr in traversing the pteff title, shews in his document a defective one in himself, a defective defense, is bad. This is no other than an example under a general rule of pleading before laid down, that where a party shews himself no good defense, he cannot suppose it. This tends to an inducement to a traverse. 2 Inst. 118.

* But by y^e stat. of Jeffreys it is a fault in form, tried by Spec. Pem^o only.

Pleas and pleadings.

It is a general rule that there cannot be a traverse upon a traverse. This rule is founded in reason of necessity. Lecture XVII.

By a traverse upon a traverse it is meant, that when one of the parties has tendered a material traverse, the other party cannot leave it & tender one of his own to the same point, i.e. one of his own upon the inducement to the first traverse. Hob. 104. 1 Inst. 282 b. 5 Com. 120. Rep. 101. Butter 74.

By the same point is meant the same identical ground of claim or defense. I observed yesterday, that when one party had tendered a material traverse the other was bound regularly to join in it. And this rule is, that the second shall join in the material, because he tendered no tender a new one of his own to the same point.

Thus suppose Diford pleads that A. S. died seized in fee, the Plaintiff replies that he died seized in tail ab sine hoe that he died seized in fee. This is proper. There is an inducement, viz. "that he died seized in tail". Now the rule is the Plaintiff must join in this traverse & not say that he ought to be barred without this that he died seized in tail. You cannot supersede another traverse, by traversing the inducement to the first traverse. If he did he would supersede a traverse upon a traverse to the same point, for the traverse you see is only a conclusion from the matter of fact contained in the inducement & the only question is whether A. S. died seized in fee.

Again, the Defendant pleads usury, in an obligation. The Plaintiff replies that it was made upon good & lawful consideration (stating what it was) without this, that it was then & there corruptly agreed to. With the inducement &

Pleas are bladdered.

The travers relate to the same point, viz. that there is no
usury, for if it was made upon good & lawful consider-
ation, it was not corruptly agreed" and if it was not cor-
ruptly agreed" it was made upon good & lawful consideratio".
Now it is not competent for the Dñe. to right tht d.
was corruptly agreed without this that it was made up
or good & lawful consideration. He must join in the tra-
vers, viz. that it was corruptly agreed to and conclude
to the Country. For if when one material traverse is ten-
dered the other may abandon it, and if he may do it, so
may his opponent & thus as the case may be, the plead-
ings w. never be closed.

But a traverse after a traverse is good, even though
the first traverse is material.

The distinction between a traverse after a traverse
and a traverse upon a traverse is not easily understood
by Students. But the distinction is important, well
founded and absolutely necessary for the attainment
of the great object of pleading.

A traverse upon a traverse is one which goes to the
same point, i.e. the same precise ground of claim or de-
fence as the traverse taken upon the other side does.

A traverse after a traverse is one which does
not go to the same point or ground of defence. In point
of time or order of pleading they may both be a traverse
after a traverse, but the true distinction is as above.

Take the action of Trespass. If a man bring tres-
pass for trespass committed, & lay it on a certain day,
he may prove any trespass committed on a different day;

Pleadings and pleadings.

Traverse,

And as he can do this, the declaration covers all trespasses committed before the action brought. But a trespass committed on one day is not a trespass committed on another day. Now if to this action of trespass the defendant pleads a release of all trespasses committed before ^{a certain} the day, he must traverse all trespasses committed after that day & before the date of the writ. The case then is this. A sues B. for a trespass committed on the 30th day of September. B. pleads a release for all trespasses committed before this time & traverses all since to the date of the writ. upon what can the pff. do? He may do one of two things according to the truth of the case. He may either deny the fact that he executed the release or he may admit the execution of the release & join in the traverse, i.e. that the Df is guilty since the release executed & conclude to the contrary. This is not a traverse upon a traverse, because the release pleaded & the traverse do not refer to the same thing, i.e. to the same trespass. The trespass intended is one thing & the trespass traversed is another. This then is a traverse after a traverse, viz. one which does not go to the same ground of defense, for when pff. does not the execution of the release and traverses the indictment to the defendant's traverse, the release of the trespass being one thing & the traverse of the trespass another, his traverse is a traverse after a traverse. - Feb. 104.

If you A. sue B. in trespass. B. pleads that on the 30th of August A. S. enclosed him, by virtue of which agreement he entered upon the land. If he pleads no more

Pleas and pleadings.

Traverses

his plea is bad, for theoffense does not cover the trespasses committed before it was made. Now he should traverse all trespasses committed before theoffense was made. Suppose he should thus plead. The plff. may, join in the traverse by supposing that he is guilty or man not so soon as he alledged &c. and conclude to the country; or he may traverse the fact of theoffense, for the trespasses covered by theoffense is one thing & the trespasses covered by the defendant traversed is another. Now if he traverses theoffense he traverses a class of trespasses different from those traversed by the defendant. This then is a traverse after a traverse for it is not owing to the same grounds of claim or defense, as the other.

Aquin. The plff. sued for a trespass committed on the 1st of September. The defend. replies that he had a licence to enter on the 10th. day of September. Now to traverse all trespasses committed before and after the licence, as the plff. may prove any one committed before or after that time. The plff. in reply to this plea may do one of three things. 1. Suppose the trespass was really committed before the 10th of September. If so he will join in the traverse by affirming that the trespass was committed before &c. and conclude to the country. 2. If it was committed after this time he will also join in the traverse that he is guilty after &c. and conclude the country. 3. That suppose there was no licence given the may the traverse the fact of a licence, and this will be a traverse after a traverse, for this traverse is not to the same point to which the defl. has reference in his traverse. Hob. 104.

Pleas and pleadings.

Traverses.

Thus far of the distinction between a traverse after a traverse and a traverse upon a traverse.

I am yet to consider how far of why a traverse upon a traverse cannot be allowed. Why should a traverse be superadded when the traverse taken goes to the whole ground of the defense or claim? and the law will never allow the parties to deviate from rules which necessarily tend to a proper & regular issue.

To the rule that there can not be a traverse upon a traverse there are two exceptions.

1. When the first traverse is upon an immaterial point, the other party may abandon it & tender a new traverse of his own which is on a material point, or he may consent to it for immateriality. This is proper because by the first traverse the point to be determined cannot be put in question, & if the other party joins in it, the controversy cannot be decided.

2. If the plff. st. declare in waste that the Dft. fell & sold his trees at the Dyer's st. for as much as he paid them for改善及 did do Boston them, alioque hoc that he sold them. This is not a traverse of a material point, for if he did not sell them it does not follow that he is recused. The inducement to the traverse is material, and therefore the plff. may reply that he sells them not & alioque hoc that he has sold them in repairing the Roads. This is a traverse of the inducement to the first traverse, as a traverse upon a traverse of the same ground of defense. It goes to the same identical waste. The waste complained of is waste.

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Pleas and pleadings.

Transverse.

justified is the same. The transverse in one case as well as in the other goes to the same point, when he says he did not file the bills, the bills are the same as those he has brought he is allowed in resuming the transverses and unless the allegation that he has lower them in resuming as is now required, the same bills are transversed by the D^rff. Chungow it is clearly a transverse upon a transverse. ⁶ And. 280. 6.
Secth 114. Brod. 99. 176. 180. 379. 406. 6. Sess. 22. note 93 p. 105. 7. 6. 104

You will observe by the way, the D^rff. in the case above supposed is not bound to tender a new transverse upon the former one, for he may demur to it, if he chooses. ¹ Secth 21.

2. There is another exception. This obtains where in a trespass laid to have been committed in a certain County, as in A. where the action is laid, the D^rff. pleads a local justification that it was committed in another County, to wit in B. with an abrogation that he committed it in the County of A. The D^rff. may abandon the transverse tendered the material & tender a transverse upon the point of justification. This is a transverse upon a transverse. The D^rff. is allowed to do this to discharge foreign places which are fables & which tend to oust the jurisdiction of the Court or transitory actions. Now A. says B. you are liable in damages committed in the C. of C. B. pleads that he was a Sheriff and by virtue of his office arrested the D^rff. in the County of B. without this that he was guilty of the affray that in the County of C. & then if the D^rff. is bound to join in this transverse he is injured for the affray that may not have been committed in the County of C. He may then desert the transverse.

Pleas and pleadings.

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take a traverse upon the indictment to the first, for
if he c^d. not according to the strict principles of the common
law, the Defendants c^d. never defeat him by affirming that
of the trespass was committed, it was within a foreign ju-
risdiction, as without this liberty he must join in the
traverse & surely be defeated. 4 Bac 73. Cro 2. 99. 418. Cro. C. 100; Rep. 101.

From these examples in French, you might be led to suppose that this mode of pleading is allowed in many cases where it is not allowed.

For it is a general rule that if the declarator writes
but one cause of action which in its nature is separable,
so that the party may recover in as much as he pleases,
so that the plaintiff will go to the same point as the
declaration, the defendant cannot make that part of the
plea which goes in answer to a part of the declaration
an inducement to a traverse of the other, with the resi-
due of the cause of action. This he can do in trespass,
i.e. he pleads justification on one day & traverses the trespass
paper laid to be committed on another. So he makes that
part of his plea which is an answer to some trespass
an inducement of a traverse to the other. This he can
not do, as I said above when the declr is in its nature
so separable that a recovery may be had for part of the
plea or Bar will go to the same part. (Found 267. 1 Buld 114. 9. v. 225.)

As for instance A sues B. on an action on the case
on contract for 100\$. B. has paid a part, 50\$ but he has not
paid all. He pleads that he has paid 50\$ & the rest ought
to be barred without this that he owed 100\$. et non nisi dec-
laration extendit only to one cause of action, but the plea

Pleas and pleadings.

Traverse.

extends to different parts of the ground of action. You see here he pleads payment as to half & traverse the fact of owing 100\$. This he cannot do, for the fact may be that he has not paid 50\$, if he could plead as above, the other must necessarily join in the traverse & controvert it, losing 50\$, for if the party he cannot recover for the 100\$ and he denies payment of 50\$ he admits there are but 50\$ due.

The difference between the cases of trespass & this case is evident, for one act of trespass covers any one of a thousand which has been committed. but here is one on one cause of action. Will then how is the defendant to plead? He must plead that as to all but 50\$ he never appeared & promised to pay & as to 50\$ he has paid them.

If again an action of nuisance is brought, the plaintiff goes to the defendant with obstructing three of his ancient lights. The defendant wishes to waive himself of an agreement as to two & to deny an obstruction of the third. Now suppose he pleads a justification as to 2 & concludes with a traverse as to the third. This is ill. He cannot do it, for he may have obstructed the other light that has no justification as to any. And if he does this plead the other party must necessarily join. He still pleads that as to all but two he is not guilty & puts his self upon the country, & as to the two he must plead his justification.

In 1 Saund. 280, there is an authority LECTURE XVIII.
referring to the 2 Saund 190, to the point, that a wrong conclusion is matter of substance at Com. Law. & it was in this view still thinks that on principle it can't make of force.

It is a general rule that the party to whom a traverse

is tendered does not admit by joining in it, the truth of the new matter alluded to in the indictment; for he is obliged to join in a traverse well tendered except in the cases before specified. If the rule were otherwise the party might always allude to important matter in his indictment & the other party by being obliged to join would of course admit it; and if he admitted it the system of pleading would become a system of chicanery & tend to delude & perplex. The indictment cannot be proved & therefore the parties are at issue upon what has no connection with the indictment. 4 Bac. ⁴ note 68.

A protestation however is sometimes used ^{of caution} and caution to avoid the admission of the truth of the indictment to prevent the effect of the admission in a future controversy. A protestation is (a protestando) an exclusion of a conclusion. It is an oblique allegation. Com. Di. Plac. et. L. Lawes 14.2. Codicil 126. 3 Bl. 311. 2. T. R. 441.

But a protestando is no part of the pleadings, for it is not insisted for the who and consequently it requires no answer & cannot be traversed.

But the party tendering a traverse admits of course what is does not traverse, for he is at liberty to deny what is traverse. For nothing material can be on the record which is not either denied or confessed. Hence it is a rule that the pleader oblige all that is necessary to destroy the others right or his plea may be demurred to. Rule 26. 4. 18 Bac. 2. 73. 1 Wils. 338.

Will he now prevent the adoption of any allegation not traversed so far as it respects any future claim by a protestation.

Pleas and pleadings.

Traverses

A protestation does not oblige the party whom it is used to prove the facts protested against, for he admits the facts as to the principal case. It only prevents the record from being used in any future case as to the matter to which the protestation extends.

Blackstone states this case. While tenant in tailors age subsisted if a villain had filed an action vs his lord & the lord was inclined to try the merits of the demand but the same time to prevent any conclusion vs him self that he had waived his dignity, he could not in this case plead both affirmatively that the p^tiff was his villain & also take issue upon the demand, for his plea w^t then have been double, as the former alone w^t have been a good bar to the action, but he might have acknowledged the villainage of the p^tiff by way of protestation & then have denied the demand. By this means the future waifalge of th. p^tiff was saved, for the protestation prevented the conclusion which w^t otherwise have resulted from the rest of the defense, that he had waifaled the villain since no villain c^r in a certain action vs his lord. 3 Bla. 312. 2 Blr. 1023. 1 Inst. 105 Litt. Lst. Sec. 192.

A protestation also is the only mode of denying those allegations which cannot be put in issue. The inducement to a traverse cannot regularly be put in issue & therefore can regularly be denied only by a protestation. Laws 148. Flw. 276. C. 4pon. Sc. Pleader. M. o. S.

But any repugnancy in the protestation does not vitiate the plea, because, strictly speaking, the protestation is not a part of the pleadings. The plea is a distinct

Pleadings and Pleadings.

Traverse

thing from the protestation. The form & mode of protestation shows that the two things are totally distinct from the common mode of protestation, as this "the Plaintiff (or his fe.) protesting that such & such allegations are not true, you please satisfy us". The protestation then is the only way of denying what cannot be controverted. Law 142.

A traverse can only be taken on a material point.

"A material point" is one which is decisive of the cause of action. If the traverse is taken on an immaterial point the issue is of course immaterial & the merits of the controversy cannot be decided. Therefore a traverse taken upon an immaterial point is determinable, i.e. is the subject of a Special Damnum. Law 118. 66024. Camb. 321. 2 Talc. 5. 28. 1 Sam. 14. note. 2 Land 207 b.c. 2 Stra 817.

This defect at law was the subject of a general demurrer. But by the Stat. of Exon (Insolvents) the defect is cured & can be taken advantage of only by ^{order 198, rule 198, with notice} special demurrer.

A traverse must not only be taken on a material point, but on an issuable point. Every material point is not issuable. True every material fact may be denied & in that sense it is issuable, but it is not an issuable material point that can be denied by ple. See E. 201. 4. 13a c. 68. 81. 1 Lawnd 22. 3. 3 Alm 320. Non 231. 2 H. 13. 182.

Thus in effect, the Plaintiff says "in consideration whereof of the Defend. assumed & pronounced" This is not sufficient & that the consideration can be traversed. 2 H. 607. 2 Nov. 3410.

Matter of Law, however material can never be traversed, & yet matter of law is often inserted in the pleadings.

Pleas and Pleadingys.

Traverse

Pleadings. According to the general rule, matter of evidence cannot be traversed. True there are exceptions as has been stated. Matter of aggravation as a general rule can not be traversed for whatever covers the act of the action covers all matters of aggravation. Yet in evidence they may both be denied. com Dipla 2014.2.2.118. 11C.8.6 Hob. 103. 1 Land 2.2.3.7 68

Again. Every traverse must be taken on a single point i.e. upon a single ground of claim or defense. If it extends to more than a single point it is multifarious, i.e. double & is therefore a defect in form. Duplicity vitiates any pleading because it tends to unnecessary prolixity & duplicitry in a traverse is as much fault as in any other plea.

To make a good traverse, that which is traversed must be decisive of the cause of action - and traversing more than this is clearly improper.

But it does not follow from this, that it must be taken on a single fact, as one ground of defense may include a vast number of facts. Thus in a plea of unlawfulness, as many facts may be set forth as the nature of the agreement will admit of. even the D^t. may traverse any one or all these facts & still there will be but one single ground of defense. Yet if the D^t. filed to an action on a contract, a willsare & infancy the D^t. ought to traverse for duplicitry, but he c^t not traverse both in his replication. Lalk 628. Hob. 103. 1 Bur 320. 860 66. 1 B&P 84. D. N. P. 93.

Again. A ground of defense may consist of many dependent facts by destroying one of which you destroy the whole defense. As suppose the D^t. pleads an accident

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Traverse,

and satisfaction. He must plead both because they both go to constitute one good defence. & on the p^t. if he comes to traverse (if he traverses at all) cannot traverse both the accord & satisfaction, because if he traverses one & supports it he destroys the whole defence.

If the two points are material either of them may be traversed, but the party ought not to deny both, unless a denial of both is necessary. Laws 48.66024. 6 Wils 333.

Another general rule is that nothing except what is alledged can be traversed, for the definition of a traverse is a denial on one side of what is alledged on the other. Consequently nothing can be traversed except what is alledged or necessarily implied. If an allegation is necessarily implied it may be traversed. Thus it is said that in a statement, living of Sisin is necessarily implied - this therefore may be traversed. 4 Bac. 68. 75. 81. Park 298. 629. Barth 99. 2d. Ray. 64. 2. vint. 77. han. pladn. 93. 93.

Thus suppose an action to be brought upon a parol promise, which is within the stat. of Frauds under Penuries, i.e. M^r. F. declares upon his promise without stating whether it is in writing or not. The D^r. f^d. cannot plead that the M^r. F. ought to be barred, without this, that it is in writing because it is not alledged to be in writing by the P^t. in his Declaration. He should plead this defence specially & conclude with a verification. But in this case such traverse will be on the 1st Dem. only by Stat. your L^t Ray 22. 38. 1. 87. 2. 512. 2.

This is a general rule, but under some further rules which are hereafter to be considered you will find this rule wants some qualification.

Assume that a word is given conditioned to pay,

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Traverse,

money at or before a certain day. The Oppo's. pleads payment before that day & no more. Now if issue is taken upon that allegation as it stands & of course for the party it is an immaterial issue, for altho' it may have been found to have been paid before the day, it may have been paid at the day (true of found for the Df. &c. it settles the controversy.) Therefore the party may traverse the fact, that it was paid before, at or after the day, & yet this is traversing what is not alleged.

I think therefore it may safely be laid down as a general rule, that since it is nowhere expressed in the Books, that when traversing only what is alleged may leave the issues immaterial, then it is competent & proper for the other party to make his traverse broader than the allegations, i.e. traverse what is not alleged, so that it may lead to a material issue. 2 Burr. 944. 2 W&G. 173.

A traverse of what is not alleged is ill advised, & deserves only. It is bad only in form, because the party pleads by way of traverse what he ought to plead by way of special matter. The only objection is the material matter was pleaded informally. 2 P. C. 935. 1566. L. Ray. 238.

And every material fact appearing in the pleadings may be traversed, altho' it be matter of question or inducement. Thus matter of inducement as a general rule cannot be traversed. If the instances are very rare in which it is traversed, the reason is because matter of inducement is seldom material, & if it may be material, it then may be traversed.

Pleads and pleadings.

Traverse

As where the pell. in an action of Slander, etc. says that "whereas he took an oath before the Mayor of London, & the Defendant said 'you are forewarned.' There is an inducement, but it is this inducement which gives the pell. his right of action & therefore the Court says it might be traversed. v. ro. C. 169. Lams 4.8. 2. Lord 208.

I have observed under a former division of this subject that every plea must be broad enough to cover the whole gravamen or cause of action. It follows from this rule that when a party justifies or confesses & avoids only a part of the allegations on the other side, his traverse must be conclusion with the residue or part not avoided.

3. If in Trespass, a Defendant pleads a release. He must traverse that he is guilty since the release & before the date of the writ. The release extends only to trespasses committed before the date of the release. Now his traverse must be conclusion with the part not avoided & that part is all trespasses committed since the release & before the date of the writ. Hob. 104. 63p. 4.15. Park 222. Bro. C. 87.

4. If in trespass the Defendant should plead a settlement, as this justifies only for all trespasses since, he must traverse all trespasses antecedent to the settlement, in order to cover the whole gravamen, etc. 293. 4. 2. Mood. 103.

I observed that if the Defendant pleads a justification at a particular time, he must traverse his liability at any other time.

Please some pleadings.

Traverse,

There is however an exception to this rule. Where the justification is laid on the same day on which the trespass is laid to have been committed, then the day is agreed upon by the parties who the trespass justifies & the trespass complained of are identified. It is prima facie a good plea & covers the whole ground without any additional traverse. The opinions are not all agreed as to this point, but the position seems to be established.)

But suppose the p^tff has laid the trespass on a wrong day (and that he may do) and the defend. pleads a release on that day, & the p^tff has really said for a trespass committed on another day, which the defend. really committed, what can the p^tff do? The p^tff must make a new affidavit in his replication, viz. that the trespass for which he actually sued, spite of which he complains were committed on such a day. 2 Litt. & S. 5 Saltk. 426. 108a 261. 138. 2 Lays. 86. Ch. & T. 17. Bul. N.P. 17. 260 C. 165. 514. 15. 318. 311.

Traversing before & after the day on which the justification is laid is not necessary, if the defend. avers that the acts which he justifies are the same with those complained of. This is our common practice in Conn. If a trespass a licensee on a particular day sh^t be pleaded, it com. law he must traverse an incident & subsequent trespasses. But by the rules of our practice he is not required to do this if he will aver in his plea that the trespasses complained of are justified on the same day according to the law of the particular state. This practice is now superseded by the 5th Bull. 26. 3 Saltk. 42. 113. 261. 138. 2 Saltk. 55. 245. 12a. 141.

What are pleadings.

Travers

in the English Courts, although there are different opinions upon the subject in the Books. Trials. 138. Tath 64. Comp. 161. B. Linn. 273. 1. Term 14th & 15th of Geo. 3. 1st. Conta. 1. Term. 184. 2. Keb. 273. 5. Dec. 207. + C. 228. 185.

One suppose the cause which is justified alledged to be the same complained of is not in fact true? Then the party is to traverse that they are ~~not~~ the same. This is so clear that allegation & this brings the parties to a proper issue.

With regard to traverses, there has been much speculation with regard to the proper office of an indictment. It is said that it is entirely nugatory, & it is asked why it is necessary when the other party is bound to join in it if well founded? Why does he not negotiate at once with out introducing an indictment with an oblique hoc?

1. In the first place an indictment when and by way of prolation, answers a very necessary & proper purpose, as has been before explained.

2. When the indictment & the traverse go to different grounds of defense, the indictment is a necessary part of the defense, for the defense is incomplete without it.

3. The great ^{instrument} of a traverse is to prevent a negative judgment. Mr. Lewis says a special traverse without an indictment is a negative judgment. This is generally true, whether it will or will not work a negative judgment depends upon the particularity of the allegation traversed.

Suppose that to a plea of being stale the

Pleas and pleadings.

(Traverses)

it was corruptly agreed that 10 per cent. should be reserved. The plaintiff applies without an endorsement merely that 10 per cent. was not reserved. This leaves the case open to an implication that 10 per cent. was reserved, which would be injury. Now he may state that the contract was made upon good & lawful consideration, without this, that it was corruptly agreed to, and the endorsement prevents the negative pregnant.

When the allegation is simple so that a defendant of it on its terms will lead to an implication where there can be no negative pregnant, and an issue on that account may not be necessary. - Mr. Justice D'Foye pleads that his co-defendant is dead. Plaintiff applies that he is not dead. There can be no implication. Law is 118.

It is another rule of pleading, that the endorsement to a traverse must consist of operable matter. The question is asked why is there a necessity for this when the endorsement is not in general issuable. The rule is founded upon this ground, that an endorsement to a traverse is generally necessary, and if it is necessary it must be pertinent & proper, & it cannot be pertinent & proper unless it consists of operable matter, for as the traverse must be on an issuable point, & as the traverse is nothing but a conclusion from a matter of fact specially stated in the endorsement, the endorsement must therefore consist of operable matter. So in the case of a traverse after a traverse it is necessary;

Pleads and pleadings.

Travers,

for the travers is a necessary territorial part of the defense, if so it must consist of ipsius'able matter, else it does not relate to the point of defense.

Generally a traverse on a direct denial, pursues the terms of the allegations. But this mode is not always right. It will sometimes lead to a negative pre-empt. Therefore an action on the case is brought for obstructing these ancient rights. If the Diffr. sh^t travers on the terms of the allegation that he has not obstructed these rights, it w^t be a neg. pre-empt for he may have obstructed two, & of so the action may be supported. 1 Saund 268. 9. 1 Inst. 126. 303. 3 Bac 301. 1 Record. 360. 153. 2. 8. 174. Complai^{nt} 25. Lectures 114. 2 Jan 319

So also in a case before man^t. To an act. of debt or oblig^t payl. at or before a cert. day, the Diffr. pleads payl. before a cert. day. The plff. can't traverse in these words that he did not pay before, for the question then w^t be immaterial, & it is clearly a neg. pre-empt. The sh^t travers before, at or after the say. 2 Bur 944. 4 Bac 66. 2 Will 173.

To that when you are to traverse all the allegations in the words of them as laid & when not, depends upon discretion, when thus traversing w^t occasion a neg. pre-empt. The travers is not to pursue the terms of the allegation.

The traverse is generally followed with these words "in modo et forma". These words are in general matter of form, altho the plea may be so constructed as to make them matter of substance. Prima facie they are not necessary traversing without these words is good. 2 Inst. 120.

Pleading a negative pre-empt is had only on special answer. It is ill in form only. 4 Bac 98. 6 Inst. 187. 312.

Lightly

Pleadings and pleads.

Duplicity

Of Duplicity.

Duplicity is a fault in a pleading, and unless it is laid down as a general rule, that is a fault in all except declaratory ^{pleas,} yet from what I have said before on that point, you will observe it is a fault in any plead. Inst. 303. 304. 4. B. c. 118. l. 194.

A double plea is one which consists of several distinct & independent matters alleged to the same point, and requiring different answers. By the same point is meant the same precise ground of claim or defense. Inst. 304. 3d l. 142. 1. B. 110.

Thus, if in an action of covenant the Defendant plead Infancy & a release, or Infancy & fraud, or infancy & duress in any two distinct defences to the same cause of action, his plea w^{ll} be double. This w^{ll} be allowed in any two distinct matters by way of defence which require distinct answers. As if he pleads infancy & a release. The allegation of infancy requires one answer, & the allegation of a release another. The allegation of infancy might require the application of res ipsa loquitur or a primum after factum now. The allegation of a release might require the application of non est factum.

But giving different, i.e. distinct answers to different parts of a declaration or different parts of a plea, does not constitute duplicity. One part of a declaration may be true, & another false. Consequently the party ought to admit what may be true, & waive it, & deny what is not true. So one part of a declaration may be sufficient to another, not sufficient. Therefore the party ought to have an opportunity to show that part which is sufficient to determine the other. Thus the 2d and may plead the general issue

Pleas and pleadings.

Duplicity

to one party, plead some special matter in avoidance of another, & deliver to a third, so that giving distinct answers to distinct parts of a declaration in plia does not cause duplicity. Inst. 304. 4 Bac. 118. Lawes 101. 2. 3

So also at Com. Law if there are several Defendants each one may plead for himself as if he was sole Defendant. This to be sure may often introduce complexity in trials, yet it w^t be unreasonable for the rule to be otherwise, for if each c^t not plead himself without the concurrence of the other, it w^t be placing each at the mercy of the other. Then w^t be perpetual room for collusion between one Defendant & the p^cff. Pleading thus as above is not duplicity. Hob. 70. 2 Stra 1140. 610. Lawes 132. 2d. May 1372.

The reason why duplicity is a fault in pleading is that it tends to unnecessary prolixity in pleading, to confusion, and where costs are taxed according to the length of the record (as they are in Eng.) it tends to great vexation. And it is never strictly necessary that a Df^c. sh^t make two distinct defences, or a p^cff to make two distinct answers to one plia. Neither Party ought to plead anything except what will or can avail him, & if one defence will answer this purpose he ought not to plead more. True there may be a difficulty in selecting one of two defences when or by one can be pleaded. This is avoided by Stat in Eng. which is to be considered. Plow. 194. 1 Will 4. 7. 8. Yelv. 13.

I have observed what Duplicity is, & the reasons why it vitiates every plia.

I would now observe by way of general rule that every plia, must be simple, entire, consecutive & confined & be supplemental.

to one single point, i.e. one single ground of claim or defence.
3. 180. 311.

This rule in some of its branches is more didactic than imperative, for a plea is not demarable because it is not simple, nor because it is not connected with logical accuracy; but it is true that every plea must be entire & confined to one single point. By this is meant that the plea must be single; it must not be double. Nothing more is meant. These words point out the necessity of unity in a plea of nothing more.

By this rule you will not understand that every plea must be confined to one single fact; for a number of facts oftentimes constitute one entire ground of action or defence. These facts however must all go to one ground of defence. As of a Diffrd. pleads an accord & satisfaction and a release both to one action. At Com. Law his plea w^t be held as being double. There are two distinct grounds of defences. But if he pleads accord & satisfaction merely he must state the agreement, i.e. that it was accordeed & agreed that he should give such an article at such a place, & that the p^{ly} sh^t accept it, and then he must aver he did deliver such an article at such a place, & that the p^{ly} accepted it. Here a number of facts & all the they are all stated (as they ought to be) yet the plea is not double.

Again. Here is a plea in Bar of an award of arbitration. Here the plea includes a great number of facts, the submission, the meeting of the arbitrators, the case &c. if any condition precedent was necessary to have been performed on the part of the party pleading, he must

Pleads and pleadings.

Duplicity.

State it & over performance. ... or in all these facts are
necessary, but so the plea cannot be double. 117 Am. 320. 31 Cal. 12. 1028
Black 142.

But it is to be observed that distinct counts in
one declaration, tending to establish one cause of ac-
tion, or several distinct causes of action, do not make
the declaration double provided each count is single
in itself. The mere adding distinct counts in one decla-
ration does not make the declaration double. True,
if each count is double, the declaration is double.

A count is the narration of the facts which con-
stitute the cause of action, or grounds of complaint. It
is sometimes called an exposition of the suit...

When there are several distinct complaints or cau-
ses of action inserted in one record each one of them is
called a count and all of them taken together constitute
the Declaration. But tho' the insertion of several counts
in one declaration does not amount to duplicity, yet
if any of the counts contain several distinct & indepen-
dent matters requiring different answers, it may be
demanded to for duplicity. 107. R. 374. 8 Cal. 87. Com. 333.
107. 101 or 104. 3 Cal. 295.

Different counts inserted in one declaration which
require different judgments wholly vitiate the decla-
ration, so that judgment may be arrested for the cause.

The reason why a party inserts distinct counts in
one declaration, is to enable the party to succeed in one
of his suits & not chance to support another.
They are inserted out of abundant caution. They do
not amount to duplicity. 313 C. 6. 245.
107. 101. 34. 371. 90. 225. 107. 104. 105. 106. 107.

Pleas and pleadings.

Duplicity.

It does not constitute duplicity if a defendant pleads two distinct matters by way of defense one is entirely frivolous and not issuable, the plea is not double.

It is not however to be understood that the plea is not double because one of the defenses pleaded is not sufficient in law. It must be frivolous, altogether impudent, and not issuable. Thus when a party pleaded a release & did not know what it was by deed, and pleaded another defense, the plea was held double, because all the the part of the defense was insufficient in itself, yet it was issuable & not frivolous. 1 Sid. 175. 1 Nels. 161. & 661.

Duplicity in a declaration consists in joining distinct causes of action, which cannot be joined, as contract and tort, to enforce one right of recovery. As if a plaintiff declare upon a contract which the defendant has failed to perform according to the conditions, & alledge that the defendant had combined to defraud him, by reason of which he had failed to perform the contract, this would be a double declaration, because the action is not to recover for the non performance of a contract, but tort & joined. There is said to be fraud. Bro. C. 14. 20. 1 Brat. 365. 2 Inst. 198. Comp. Rad. C. 39.

So in declaring on a Bond the affixing of more than one breach in the replication which is by the party is duplicity at common law. It is wholly unnecessary on this action to affix more than one breach, because one breach works a total forfeiture of the whole penalty. It is then improper for the party to alledge any more. 4 Bac. 134. Lamer 25. 6. 2 Inst. 178. 2 Worts 267. 6 Inst. 21. 2 Inst. 33. 3 Inst. 108

Pleas and pleadings. -

Notability,

The Eng. Stat. of 8 and 9 Will. 3rd has introduced a different rule in actions tried on penal bonds. That Stat. provides that in this action the party shall recover as much as in Equity he ought, i.e. as much as shall compensate him for the actual injury sustained; therefore a new rule of pleading is introduced, for he may assign as many breaches as he can, as he recovers according to the real injury sustained, which may depend upon the number of breaches. This Stat. relates to Bonds of a particular kind, but it has been extended by the Courts to most Bonds. 21. 16. 12. 6. 2. 13. 12. 10. 16. 111. 2 Wils 87, 7. Corp 387.

But the rule in covenant broken is different from debt on Bonds. For at Com. Law in an action of covenant broken, the Pess. may assign as many breaches as he can, for he recovers according to the real injury sustained. Consequently at Com. Law the assignment of more than one breach in an action of covenant broken is not duplicity. 4 Bac. 131. 2 Lard. 397. 6 Com. 233. 266. 5 Bac. 546.

In Con. also the rule as to assigning breaches on a general Bond has always been the same as it is a Com. Law in an action of Broken Promise. Our Stat. does not expressly authorize this manner of pleading, but according to a liberal construction of a very general Stat. of ours, the party can recover on a general Bond only according to the actual loss sustained. Therefore here in an action on a general Bond, the party may assign as many breaches as he pleases. Stat. 27.

At Com. Law I observe that the party pleading cannot plead two distinct pleas to one cause of action;

Pleas and pleadings.

Duplicity

nor incorporate distinct defenses in one plea.

But by Stat. 4. and 5. Ann. ch. 29. often with leave of the Court may plead as many different defenses as he pleases, to one cause of action. And this leave of the C. is matter of course. This Stat. was introduced to remedy the difficulty & inconveniences which arose from choosing, one of several defenses, which he may have had. 4 Bac. 121.

We have no such Stat. nor any such practice in Conn. Yet in Conn. there is not the same necessity for this Stat. as in Eng. for two reasons -

First, we are not obliged to plead specially in many cases when an English pleader would be obliged to

Second. - In this State the Defend. is allowed a new trial for mispleading. This is not the case in Eng. Yet it w^{ld} be well if we had such a Statute.

This English Stat. comprehends no other than pleas to the Declaration. It does not authorize the P. off. to give two replications to one plea in Bar, nor the Defendant to give two rejoinders to one replication. There may be, it is true, as many replications as pleas, & as many rejoinders as replications. 4 Bac. 121. Com. vi. section 5. 2

Duplicity however is a defect in form only and no advantage can be taken of it except by special demurrer. The objection is not that the plea wants matter, but that there is a redundancy of it. And this special demurrer must point out the particular in which the plea is double, or as Lord Hobk. says, th. pleader must lay his finger on it. 4 Bac. 29. Salk 219. 678. 1st. Ray. 332. 798. 1000. 1. 19. 2 Bac. 134. 18 and 337. Com. sup. pleader 233. 2. 2. John's Supplement 3.

This -

Pleas and pleadings.

of property.

This last rule that duplicitry is only matter of form does not apply to cases where the party joins in one declaration & lists it causes of actions, which according to the rules of pleading cannot be joined, as distinct substantive grounds of recovery. As if he declares in one cause in Court on Bond & in another on his Warrant. Here the Declaration is radically defective. It is bad on general Grounds, it is bad on a want of error & is a ground for a motion for arrest. This is a misjoinder of actions & is much worse than duplicitry. It is bad because the two causes in the declaration require different judgments. It destroys the distinction between a libel in cordia and a captiatus. Regy? 233. Saltk 10. 3 Litt. 97. Com. 4 P. 22. 11. 119. 86087. 122222.

333. 1st Rep. 274. Thus far of Duplicitry.

Of making protest & laying Open.

The subject of protest and open is to be considered. It is general in the law, that when either party demands or demands a debt and claims title under it, he must make protest of it, i.e. he must plead it with a Protest in writing. Com. Dig. Head 3. 3 Will. 1. Appx. 22.

These words are derived from the form of making the protest, i.e. he avers that his produce or bill is the subject of

which protest is made, that the adverse party may have Open or a copy of it and that the St. may inspect it. At the written or oral hearing. The object then is that the party may hear it read & he pleads it have a copy of it and that the Court may inspect it. 10 Ed. 3. 7 Bob. 233. Litt. 96. 60028. Com. 2d. folio 52.

11th

Plaus and pleading.

Proprietary.

The adverse Party when entitled to offer must not plead without it, until the deed is shown to him, but if he does plead without making a demand, he waives it and can never again claim it. 3 Gall. 119. b. 283.

But in St. B. Propriet is never made of a Bill of Exchange or Promissory Note, because they are not deeds. An action on a Bill of Exchange is generally affirmed, and the instrument is only evidence of the promise made in the declaration. Whittle 185. Burne. 243.

But in Conn. Propriet is always made of a promissory note, because we consider it as a deed, and declare upon it as such. We regard it as a specialty. In the State of New York it has become frequent to seal promissory notes to make them deeds. Our Lts. consider the sealing as nothing, and if they are in writing, they are deeds.

On this subject of pleading with a Propriet some distinctions are to be observed. —

It is a rule that if a right actually acquired by deed will pass without deed, he who claims the right is not obliged to plead the deed even if he has it, & if he is not bound to plead it, he is not bound to make protest of it.

But in all cases where the right can not be acquired without deed, he who claims the right must plead the deed & make protest of it. It is in dowers of apprenticeships, a release, a devise of lands. These cannot be lost by deed, consequently the deed must be pleaded with a protest. 6 Co. 138. 11 Dall. 119. Cro. C. 143. 3 & Rep. 156. 1^o and 2^o

But when the right will pass without deed, if the Party pleads the deed to make title under it, he must make

Holds and Headings.

proper page.

Hold of it, as in the assignment of a lease. If he pleads his assignment by such & makes title under it, he must make proof of it. 2 Mod. 610. 12 Anne 97.

But when he pleads a deed if he does not make title under it, he is not bound to make proof of it. 6 Co. 38.

A stranger to a deed may plead it. Lecture XV. without making proof of it. The reason is, it is not in his power to do it. He may indeed compel the other to bring it into Court by a ~~Saf~~ ^{Sub} poena duces tecum. 10 Co. 24. 3. 2. 83. Blaw. 149. 10 Co. 394. 2. Blaw. 4. 18. 1 Sand. 92.

And a person who acquires title by operation of law from another who claims title, is not bound to make proof of it. Others if a Tenant or Power brings an action against the Lessor, she need not make a proof, for she is not supposed to have it in her power. 5 Co. 1. 1 Inst. 225. Park 305.

But to this general rule last laid down there is an exception in the case of a Tenant by curtesy, the wife claiming it under a deed, she must plead the deed with a proof, because the husband is supposed to have possession of the wifes deed & may retain them. In the case of a Tenant in Power the wife is not supposed to have possession of the husbands deeds. They go to the Lessor at Law. 10 Co. 226. 10 Co. 94. 4 Bac. 110. 1. 5 Co. 70.

A Record may be pleaded without making proof of it, because the Law requires that a record sh. be kept in some certain publick place for the convenience of those who may wish to resort to it. And even a record of the same C. in which the plea is made, need not be pleaded with a proof, but it is said that in this the party must point out it.

If pleas are pleadings.

To profit & loss.

number of the note that the other party may easily find
it. 1 Inst 225^b 18. At 252. Items 47-220-237.

But tho' a stranger to a deed may plead it without
profit, yet privies to a deed must plead it with a profit,
i.e. those who are in legal priority with the persons to whom
the deed was given, must plead with a profit, when the
original parties are bound by a plead.

As where the heir at law claims under a deed made
to his ancestor, he must plead it with a profit, because
the deed goes to the heir at law. Inst 207 31. 10 Co 92. 94

So also where a man limits over an estate to A.
with remainder to B. the remainder man must plead
it with a profit, because as the instrument succeeds
to the advantage of both, each may have it. 10 Co 92. 94.

The rule that the heir at law must plead with a
profit when he claims title by and to his ancestor, does
not hold in this State. Under the Law of Descent the real
estate of the person deceased descends to all his heirs. Now
suppose there are 10 Children & one wishes to sue after par-
tition is made. He may not have the deed, for he is no
more entitled to it than either of the remaining Nine.

I believe he is not even bound to produce it in evi-
dence - according to our practice, the practice in this who
such may produce a copy from the Iowa record. In Eng.
these reasons do not apply. The eldest son is heir. The deed
then goes to him & he can certainly produce it. To profit
comes next, says in Eng. the heir would not be obliged to pro-
duce it. This however is mere matter of speculation.

If a deed is lost by time or accident or destroyed

Heads and pleadings.

of legal forms.

by counsel by cause first, it may be pleaded with a protest.

So also if the sue is on the profession of the adverse party, it may be pleaded without a protest, altho it belongs to the party pleading the issue right to do.

But this pleading will be bad at law. Law however will in Eng. admit the party thus pleading without protest, states the reason for omitting the protest. It will be determinable. He must alledge that it has been cast by counsel, by time & accident, so that it is on the profession of the adverse party. He cannot omit the protest without cause, otherwise he will be concluded by it. He has stated on the record that he has it on recd. & no evidence will be admitted to show that he has or not in his profession. 560, 74, 6, 75^a, 180, 16, 180, 3, 171, 151, 157, 171, 172, 36, 2, 53.

One may see the same point decided in own country. 180, 54, 1, 2, 180, 4, 82.

If however in such a case the party pleads with a protest, the adverse party is entitled to own, has the plaintiff's claim, the party pleading the protest. Counsel, protest.

Yet the pleadings may be an end, by ^{in which case} the party's making his complaint ^{being protest or specifying the reasons.} 180, 16, 3, 51, 153, 11.

And after the deed is duly instrument to the claim or defense, protest is not necessary, because by the subscription title is not made or done it. 83, 16, 573, 1060, 42, 6, 6038, 6.

But it has been long since settled in law, that a protest is not necessary & that one is as good as all without it as with it, in which case it is necessary to file with protest, so that one may be demanded, in law, over its demandable without it. 180, 566.

- Pleas are pleadings.

proposal voter.

At Com. Lian where project is necessary to be made, the
construction of it is in defect. or substance, & not even by word.
ict. Indeed at Com. Lian almost every defect was made of substance.

(But now by the 1st. 16 and 17. Cap. 10. and 41st & Annex'd. two great Statutes of Jeofrald) the omission of a profest. when necessary, is reduced to mere matter of form, and no advantage can be taken of it except by special demurrer. This is still therefore a defect in form, yet it is added by a verdict by the opposite party's and even by general. Moreover. Rule 30. 1. Cor. 1st. 32. 4. Bac 113. 1. ro. Eliz. 217.

In Shullon 54. it is said that it is but only on special
occasions ever at C. L. The opinions are the other way.

But slippin a doc to be lost or destroyed, & the Party
to plead it with a profert, how is the Party's pleading to
avail? How is he to show it? In such a case it is an es-
tablished rule that a sworn copy on own parole,
of its contents is admissible.

But it must first be made to appear probable to the Court, that it is lost or destroyed. Merely alibi, or lost, will not answer to lay a foundation to introduce this evidence.

Therefore it is a general rule, that where a party alleges
that he has lost a deed, he is not allowed to introduce
this secondary evidence, until he makes it appear probable
to the Ct. that such was the fact. In few cases positive evi-
dence that the deed was lost can be found, therefore the law
allows probable evidence of the fact. It may be render-
ed probable in a variety of ways, as proving that his
house has been burned, with his papers on it. This is very
strong evidence. 1 Chit. 446; Chit. 200, 6. 100, 2, 6, 7, 8, 9, 29, 30.
1 Chit. 365, 7, 8, 16, 63. 2 Chit. 270, 18, 19, 32, 3.

Pleads and pleadings.

of probate papers.

The same evidence is also admissible where the deed is in the hands of the adverse party.¹

Yet here another rule is laid down, viz. that notice must be given to the adverse party by the pleader to produce it, and if he does not give this notice, he cannot produce the deed by a sworn copy, and *a fortiori* he cannot by *probate evidence* - and of the party who has the deed will not produce it, the other party may introduce this secondary evidence. Chancery will compel the party to produce it. 1 Esp. Rec. 50. Chitty, 3d Ed. 372. Bracton, 165.

The object of the protest is to enable the adverse party to have *copy* of it. When therefore protest is made, the adverse party is entitled to *copy*, i.e. a *true* copy impels to *hear it read*. 4 Bac. 113.

But he is entitled to something more than to *hear it read*. He is entitled to a *copy* of it at his own expense. Merely to have it read might answer a very inadequate purpose. 1 Hob. 217. 4 Bac. 113.

But *copy* is not demandable of a record, even where the party makes protest of it, because unless he has it, yet in judgment of law he has no right to it or control over it. 1 Saund. q. 108. 14 p. 147.

But if a deed is pleaded with protest when protest is not necessary, & the other party makes title under it, the other party may demand *copy* of it.

And if a deed is pleaded with protest when protest is not necessary, the opposite party cannot claim *copy* of it. As in the case of a deed pleaded by way of *indorsement*. The party does not make title under it.

¹ See sufficient cases.

Pleas and proceedings.

Perfect Lawyer.

Oyer is demanded so that the party may have the instrument and that he may make answer to it, i.e. so that he may plead better to what is alleged on the other side. Now where a person does not deserve like consideration, & tho' he makes protest of it, Oyer is then useless because it cannot enable him to plead any better. Wherefore in such a case consider his plausage. ^{with 29} Salk 477. Tidke 41, 39. 2. 20 with 395. Dyer 476. 7. Faund 97.

Granting oyer, where it is not demandable is not error. Error is not predicable of it, for it can do neither harm nor good.

On the other hand the refusing of oyer by the C. when by law it ought to be granted is error, for it deprives the party of a privilege to which he is by Law entitled. ^{with 29} Salk 477. Faund 97. ^{with 29} 2. 20 with 395.

When oyer is granted, the party obtaining it, may either at length recitation upon the record take advantage of any condition omitted by the party pleading, i.e. any thing which on the face of it operates in his favor.

As in an action brought on a Promat Bond with a condition. The party may put this Bond with the condition on the record & show that he had performed the condition, for if the condition should never appear, the obligor might recover the whole penalty; and after reciting the condition the oyer may then performance.

Yet in many cases the party obtaining oyer will have nothing more to do than to spread it upon the record and do over to it, because there may be a variance between the instrument produced on oyer & the instrument declared upon. And therefore whenever there is such a material variance as would work a nonsuit, then the party obtaining oyer may spread the instrument on the record, and do over to it. ^{to 23} Mod 23. Laws 28. 4. 3. Bla 299.
(See supplement 66.)

Pleadings.

Robert Dyer.

It is where A. declares in an action of Covenant for 100 £.^s & pleads upon the instrument, it appears to be one where the condition is only so &c. &c. may spread this upon the record and demur to it.

If the instrument declared upon is insufficient in law to support a claim in defense, or appears on the face of it to be illegal it may be spread upon the record and demurred to. But if the insufficiency or illegality does not appear on the face of it, then the party must show the fact by an affidavit. He cannot with safety be demurred to. *Wyllms 34 2. Sancs 99.*

Thus suppose an action is brought upon a general Bond, in the condition of which it appears that the consideration for which it was given was illegal (as for a Bribe); - Then as the illegality appears upon the face of the condition, it may be spread upon the record and demurred to.

But if A gives a single bill for an illegal consideration and it does not appear on the face of it, the party must show the illegality by affidavit. He cannot Demur.

If the party obtaining upon recites the deed, the adverse party may sign judgment as you doant of a plia, or he may procure it to be enrolled on his side in his replication and then demand. He may thus sign judgment, because the party praying upon reciting the instrument, impliedly promises to recite it truly. It is a breach of trust of an implied engagement & he must al-

Pleads and pleadings. propost & other.)

his party recite it truly, as he has therefore recited it entirely his plea stands as though he had not plead ed at all. 1 Saunq. 6. 316. 17. Court. 301. 4 St Rep 370. 1. Star 227.

Departure.

I am now to consider the subject of departure in pleading.

Departure is the dereliction or abandonment of a former defense on one side, or ground, of claim on the other, for one distinct from the former & not fortifying it. It formerly observed that the allegations of each party in each successive stage of the pleadings should fortify what has before been alleged on his part. Thus the replication should fortify the declaration, the rejoinder should fortify the plea in bar &c. After a person has taken one ground of defense or claim in one stage of the pleadings abandons it and assumes another, he makes a Departure.

Thus in an action suppose the Difend. pleads in Bar & feoffment in fee, and a replication he rejoins a gift. This is guilty of a departure, he claimed in his Bar in fee simple by feoffment, now he claims in fee tail by gift. 3 Blw. 310. Chou 7. 6. 105. Wins. 303. 6. 304. Star 422. Ray 222. L. May 344. 9. 26. 136. 2. 802.

Again Difend. pleads in Bar, In fancy, the party pleads necessaries the Difend. rejoins a release. This is a departure, for by pleading a release he admits that he was not an infant. 1 Inst. 303. 4. (See Nat 73. Star 422. 1. See 10)

So in an action of Consonant Breach where the party is bound to perform certain things on conditions precedent

Pleas and pleadings.

Departure

to his right of action. He avers performance. The Defd. pleads that he has not performed one condition. The Piff. replies that he was ready to perform it and that the Defd. refuses to accept performance. This is a departure. The Ch. have plead this fact as it was.

If the matter first alleged is alleged at Law. Law, or subsequent plea supporting it by Special and custom is a departure. As when the Piff. brings an action at Law. Law on an indenture of apprenticeship. The Piff. pleads infancy (which at L. C. is a good defense) the Defd. replies, custom of London, by which minors may bind themselves by indenture. This is a departure. He should have beat his action on the custom. 12v. 81. 1 Roll. 361. 4 B. & B. 572.

A plea affecting a right at Common Law is not fortified by a plea showing a Statute right. Thus where on the 1st of July for taking the Piffs. beasts, the 1^o D. for d. pleads taking them damage feasant. The Piff. replies driving them out of the County. This was holden to be a departure, because at Common Law driving them out of the County did make the defendant a trespasser. This is made so by virtue of ch. Stat. 52 Hen. VIII and 1 Phil. and Mary. 3. L. 48.

But if one party claims under a Stat. & the other party pleads a repeal of it, the first party may fortify his first plea by alldging that the Stat. is revived by a subsequent act & it will be no departure. 4 Bac 123. 1 Gov. 81.

(See where the cause of action is alldged general by in the declaration & the 1^o D. for d. pleads what is called an evasive plea, i.e. answers the cause of action as it appears on the declaration, & answers it truly, a new

Pleas and pleadings.

Departure.

Assignment of the cause of action is not a departure, a novel assignment may be, save it be so made as to work a departure, but a novel assignment varying the statement in the declaration so as to bring the true cause of action up, is not of course a departure.

Thus if in trespass, Jeff. pleads a trespass on a certain day & the defend. justifies for that day, the pess. may make a novel assignment, i.e. he may allege that the trespasses complained of were committed on another day, & that they are not the trespasses justified. This is no departure because the day is not material. 3 Will. 20. 17 and 28. note. 63 N.P. 1⁷⁶⁴. Laws 164 or 164 & 3 Bl. 311. Laws 240. Jan. 2d.

Departure is a substantial fault or pleading, and is reached by general demurrer. It is said in one place by Sergeant Williams in his notes to Faunders that it is on special demurrer only, yet he corrected it afterwards, for it was an error. 1 Faund 117. 2 Ibia 84. Salk 221. 2. 66a 422.

Although a departure is a substantial defect it is cured by verdict. In fact it has been decided by the Supreme Court and affirmed by the Supreme Court of Errors that this defect was not cured by a verdict. Ray 22. 86. 94. Laws 165a 288. 15 or 110.

When an issue is joined on an immaterial fact and the court cannot know from the verdict for whom to render judgment, a repleader will be awarded. 3 Ray 450. Salk 178. 579. ...

Pleas and pleadings.

Demurrer.

Section. XXI.

A demurrer is defined by Mr. Law to be an irregular collateral or part of pleading. This is however not so by intension. It does not shew any thing specific. A demurrer is in strictness not a plea but rather an excuse for not pleading. There are but two kinds of Pleas, viz., dilatory pleas, and pleas to the action. These admit of subdivisions but a demurrer does not come under any of them, because by the demurrer, the party taking it, denies that he is bound to make any answer thereto & therefore prays judgment. 4 Bac 129. 30. 3 Wils 292. 3 Bl. opibz 234. Sawys 42. 236. 241. Inst 71.

A demurrer advances a legal proposition which is that the pleading on the other side is insufficient in law. And therefore it is said that he is not bound to make answer, i.e. what is alledged on the other side does not in legal contemplation require an answer.

A Demurrer admits such matter of fact as is alledged by the adverse party, as are well pleaded, but denies their sufficiency in law. And then, you perceive, it refers the Decision of Law arising upon those facts immediately to the Court. The question is are these facts sufficient in law or are they not. He does not raise a question of fact, as a Plaintiff or an issue does, neither does he introduce any new matter as a specific plea. He advances as before said a legal proposition. 4 Bac 129.

This legal proposition is a denial of the legal proposition expressly or impliedly contained in the allegation

Pleadings and pleadings.

Demurrer

allegations demurred to, for all pleadings contain the syllabus in substance.

A demurrer may be taken to any part of the pleadings, i.e. to species or other alleged in any part of the pleadings, & to that part that it may be taken at any time, as soon as an issue is joined. See 2 Inst. 72^o & Mod. 132.

It will be observed that a demurrer admits such matters of fact alleged on the other side as are well pleaded, but it admits no other facts than such as are well pleaded.

If then in an action of covenant broken the p[ro]ff. avails some breaches well & done ill, a demurrer to the whole declaration adm its other breaches only as an averment, & the p[ro]ff. will have judgment for damages by. 1 Wills 243. Holt 191. Salk 218. 2 Saund 279. Hobk. 3 b. 232. 1 Wm. 338.

Under this general rule it follows also, that a demurrer never admits an averment which contradicts what before appeared certain on the record. And an averment is always bad. If he pleads a fact which is impossible it can have no legal operation in his favour. Indeed this is good cause of action in error. 3 Inst. 124. Cro. L. 25 or 35. Lawes 168.

Thus when one pleads a record & afterwards contradicted the record, a demurrer did not admit it.

Upon the same principle it is that a demurrer never admits what appears on the face of the pleadings to be impossible. An instance of this occurrence, in an action of replevin, charging the plaintiff having

been

Pleads and pleadings.

Demerurus.

been taken into one parish & county and the other party avowed taking them in another parish & county, and then averred that one County was within the other. This was held to be impossible, & that a demurser did not admit it. 1. Tira. 10. Com. Di. (Stal. 2. 6.)

Again - A demurser does not admit facts averred which it appears on the record cannot be ^{equally} proved. It is to no purpose that one party makes averments which in law he cannot prove.

Thus if one should plead a release of a bond, by Parol, or a release without averring it to be by deed a demurser would not admit it, because a parol release can't be proven at C. Law. 2. Wts. 376. 6. Cro. 1257. Law. 42. ^{q. 172.}

Again. A demurser does not confess allegations which are ^{imperious} & immaterial & non traversable. Such allegations cannot be denied. They cannot be traversed; and a party taking a demurser ought never to be considered as admitting what he could not have traversed. If he does, this consequence w^t follow, that a party w^t be obliged under certain circumstances to confess allegations which he chose to or not. Sack 562. Laws 168.

A Demurser never admits the truth of an affidavit or immaterial averments. These are not traversable and therefore a demurser does not confess them. A demurser will generally confess those allegations only, which may be denied by the opposite party. 4 Bac. 131. Salk. 561.

Again, a demurser never admits more conclusions of law made by the adverse party from facts

Stal. 2.

Pleads and pleadings.

Memorandum. 4

stated. Allegations of facts are the only proper subjects of damages. It is impossible to damages upon a conclusion of law.

This is a plea of justification. It is used for the defendt. after stating the facts which form his justification to conclude "protegat bona fide", "as by the law he might", or "as by law he had a right to do". Nor a damages to this plea does not admit this conclusion of law, for if so a party by drawing a false conclusion of law would prevent the other party from recovering. Hob. 56.

With these qualifications a damages admits such facts as are well pleaded.

After an issue is joined a damages cannot be taken. As long as the pleadings are open a damages can be taken. Com. Pla. D. 604 ab. 13 Thom. 213.

A damages is generally called an issue in law. But is not so strictly considered. In rather tends to an issue than forms one, because the issue is not joined until the joint or damages is made. 3 Bla. 313. 14. 10. 1805. 71. 126. 4 Bac. 129. 54 or 514.

If there is a damages and an issue in fact in the same pleadings, the damages is regularly to be tried first, that the jury may assess the whole damages for the whole cause at once.

This is covenant broken, the 20. has damages one branch it damages to the other. The damages is tried first, that the jury may assess damages upon both, then that, but if the issue in fact were tried first, the jury could assess damages for that only, & damage more

Pleas and Pleadings.

Demurrer.

afterwards to appear on the demurrer. This is a rule of convenience and is entirely discretionary with the Court, for they may have either this first. (Inst. 72. c. 125. Pall. 57. 4 B. & C. 130.)

And if when one party is demurred to it is found for the plaintiff he may enter a new process to the issue in fact. I have his reasons abut only on the demurrer. (Balk. 219. Inst. 574. 4 B. & C. 130 or 30. Inf. foliorum sec. 310 Capp. 23. L. a. 42. 43. 4.)

It is a rule that there cannot be a demurrer to a demurrer. A demurrer is not an allegation of new matter. It is therefore absurd to demur to it.

It is said however by Lord Holt, that there may be a demurrer to a demurrer when a pleading is bastiment. It is not opposite. This I cannot understand. The demurrer certainly raises the only question of law which can be raised by demurring. (Inst. 630. Balk. 219. 18a Reg. 20.)

And as a demurrer cannot be demurred to it follows that where one party demurs the other party must join. You cannot traverse it, or plead specially to it, because there is no fact alleged in it. (Inst. 630.)

The form of a demurrer in our country is an abridged one. The defendant says the plaintiff's declaration of matters therein contained are insufficient in the law and therefore he prays judgment, & then the defendant says his declaration is sufficient.

As to the effect or consequence of a demurrer,

It is a rule in civil cases that judge upon a demurrer, excepting a demurrer to a dilatory plea is prompt, i.e. final, judgment on the chief. It is not a judgment. (Inst. 57. p. 11. n. 5. 6.)

Plaints and pleadings. Demurrer,

respondent as ouster. When the p^tff. recovers it is quod recipiat, when D^ref^d. rat. sine die. Bank 306. 16 gen 69. 341.

Now the rule in criminal cases short of felony is the same we Com. Law. If a party is indicted for any offence short of felony & he demurs to the indictment, and judgment goes against him it is a judgment in chief. 2 Hawk. 334. 16 C. 60. Com. Elec. 196. 4 Bla. 334. 338.

But in prosecutions for felony or any other capital offence, the better opinion is that the party may plead over after his demurrer is overruled. Dr. Scott has laid down the rule differently in one part of his work, and in another part, as I have laid it down. 4 Bla. 334. 338. 2 Hawk. 334. 2 Hale 239. 237. 225. 315. 243.

If a D^ref^d. demurs to the declaration, and concludes with a plea in abatement, still the p^tff. may join in Bar, as the reprobation is in the demurrer as tho he did not conclude in abatement, & have judgment in chief as the declaration is admitted. Lawes 372. 3 Law 423.

Demurres are either General or Special.

Demurres are of two kinds. 1st General. 2nd Special. Lecture XVII.

The difference between a general and special demurrer consists in this. A general demurrer affirms no specific cause of demurrer. A special demurrer shows which specially points out the cause of demurrer, on the defect on which it is founded. Thus if the D^ref^d. merely says, "the p^tff's. declaration of matters therein contained are insufficient in the Law" and concludes with praying judgment, this is a general demurrer. But if he demurs

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Demurrer.

in this way "the p[ro]p[ri]e declaration &c are insufficient for
conveniences that the p[ro]p[ri]e has not laid when & where the
cause of action arose." This is a special demurrer. The
want of a cause constitutes the insufficiency and it
is sufficient a cause for excuse. *1 Inst. 320. 72. Lams 167. 4 Bac. 132.*

It is said by *Lams 167* that special Demurrers
were introduced by the Stat. 27. Eliz. But he is certainly
incorrect. They were not introduced by this Stat. for they
were known before the Stat. was made. This Stat. makes
special demurrers necessary where as. t. s. a general de-
murrer w[ould] have answered the same purpose, i.e. where the
objection intended to be reached by the demurrer is a formal
defect, it is to be a special demurrer. *4 Bac. 132. Hob. 232. Lans 337. 10 Inst. 240*
2 Inst. 26.

But to constitute a special demurrer it is not
sufficient that a cause of demurrer be assigned. It
must be specially assigned, i.e. assigned with particular-
ity. The assigning of a cause of demurrer if generally
assigned does not make a special demurrer. Thus if Diffr.
says the p[ro]p[ri]e declaration is insufficient for cause spe-
cially assigned, because it is uncertain & wants form.
this is a general demurrer, because he has not assigned
the particular on which it wants form. He should have spe-
cially assigned the uncertainty, as that it wants a venue.
2 Inst. 219. 6 How. 242. Lamb 297. 2 Ed. Ray 779.

I observed that the opinion of Mr. Lams was clear-
ly incorrect. The fact is all demurrers were anciently spe-
cial. And says Lord Coke, there was anciently no such thing
as a general demurrer and he was ignorant of his propo-
sition at the time of the Stat. 27. Eliz. He says it is a good

Pleads and pleadings.

Demurrer.

rule to make it special, in all cases, because it is safer I suppose he means, as there may be great doubt at times whether it is a defect in form or in substance. 2 Bla. 267. 1 Wre. 240.

A special Demurrer, it is to be observed, reaches all defects which a general Demurrer does, and others which a general Demurrer does not. And for the purpose of dis covering the precise difference between the effect of the two, observe this rule -

All substantial, i.e. material, defects are met with as well by a general as a special demurrer. But defects in form can be attacked only by special demurrer under the Stat. 27 Eliz. - If therefore one demurs specially & specifies a special and particular cause of demurrer, if this defect really exists, his demurrer will reach it, and this demurrer does not reach this defect pointed out, yet if the pleading is substantially bad, his demurrer will be good. Lath. 185. 76. 6. 127.¹⁶⁴ See a 624. 3 Bla. 315. 1960. 88. 1 Inst. 72. 2 Com. plading 5. b.

This is a rule introduced by the Stat. 27 Eliz. and it obtains throughout the Union. Our Ls. have adopted the reason & spirit of that Stat. as Com. Law.

There is a farther Stat. on this subject, viz. 4 & 5 Ann., which has extended the necessity of demurring specially further than the Stat. 27 Eliz. The Stat. 27 Eliz. introduced the general rule, that no advantage should be taken of defects in form except by special demurrer. The Stat. of Ann. extends the general rule to certain particular defects expressly named, it is not supposed to be within the Stat. of Eliz. 4 Wre. 103. 4. 136.

It is proper to observe that in all pleadings two
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So emurur,

things are necessary - 1st. That the matter pleaded be sufficient,
2d. That this matter be alledged according to the form of law.
The omission of either of these requisites is good cause of de-
murrur. The omission of the first is good cause of general
demurrur. The omission of the latter is the object of a spe-
cial demurrur. 1 Inst. 373. 4 Bac. 2. 7606. 164. 22a. Ray. 793. 802.
¹⁶⁵²³²

But what is substance and what is form? This is often
a difficult question. They are not subjects of any very par-
ticular definition. It must be left to the judg. of yr. pleader.

The most definite rule is this. The omission of that
without which the very right does not exist unless he has
pleaded that at. gives him a right of action - appear is
defect in substance. On the other hand, the omission of that
without which the very right does appear, but which
is not alledged according to the forms of Law is a defect
in form. Here the defect does not consist in the omis-
sion of any thing which is the gist of the action or defense.
7606. 232.

As for instance of a defect in substance. Sup-
pose the plf's. right of action is to accrue by the perform-
ance of a condition precedent & he omits to aver perfor-
mance. This is a defect in substance, because by the sup-
position the very right does not exist, unless he has per-
formed that which gives him a right of action.

Again - Suppose in case in which Sciencer in the
Pleading is necessary to subject him. In the declaration
the Sciencer is omitted. This is a defect in substance. The
Sciencer goes to the ground or gist of the action. The omission
of the Sciencer causes the very right not to appear.

Pleas and pleadings.

Semper.

But suppose, & I sue'st in a small battery but o-
mly to say the place where it was committed. This is clear-
ly mere matter of form, because it is immaterial where
D. inflicted the battery, if he did inflict it. The mere right
of recovery appears. The action is transitory and the form
of Law requires that a venue should be laid. But it is on-
ly required as matter of form.

Again. Suppose a declaration is double to enforce one right of action. As if contract and tort are combined by the pteff. together. What is the nature of this defect? It is clearly a defect in form. The pteff. has shown enough, indeed the defect is that he has shown too much. The right of recovery appears on the declaration. Again -
Defend. pleads specially what amounts to the gen. issues. This is a defect in form only because he pleads what is sufficient, he only pleads it informally. It results from what I have before observed, that where there is a local want of substance (as where A sues B. for incivility, or where a material allegation is omitted (as if pteff. in Trover does not allege property, or in Trespass possession), a general demurrer is proper. - Bob. 133, 198, 232, 301. Cant. 389. See 184. Stra 624. Blaw 79.

If one party pleads a plea which upon the face of the proceedings he appears to be estopped from pleading, it will be a general demurrer because it appears that he has no right to plead in any form what he does plead. ^{Lawns 170. Wilts, 13.}

I have observed that no advantage can be taken of formal defects, except by special dominoes. I would further observe that a special domino reaches no other formal defect, except those specially designed as cause.

Pleadings and pleadings.

No recovery.

of demurrer, for as to all defects not specially assigned, the defendant is a general demurrer. This assigning a formal defect specially as cause of demurrer does not enable the party to take advantage of any other formal defect under his demurrer. 10 Co. 88. It makes however no defect in substance.

I would here observe that if on demurrer to the declaration judgment is given for the defendant, no time is lost in commencing action for the same cause can afterwards be sustained on the same grounds as are disclosed in the first declaration. The plff. cannot bring another declaration like his first. b Mod 20. 308. 35. 557. 6. May 4, 1779. 2. June 11, 179.

But where the plff. fails for want of an essential allegation, he may maintain another action and bring a second declaration, in which the allegation may be omitted. The grounds disclosed in the second are not then disclosed in the first, tho' the cause of action is the same. And this is a rule which justice & common sense requires. In the first case the legal merits have once been decided, in the other, the legal merits of the second declaration have never been tried. So if the plff. misconceives his action, as if he bring trespass for trespass, and the declaration is held on demurrer, he may bring a second action or brought, because these two actions are neither similar nor concurrent. b Co. J. 30 Will. 2 40. 304. 2 Bl. N. 779. 831. 822.

There are a number of distinctions to be observed how far a recovery in one action shall be a bar to a second. These do not fall properly under this title, and will not now be considered.

One word however further. That declaration is

Pleads and pleadings.

Germarre

bad through a mistake in the pleadings, yet if the Plaintiff takes no advantage of the mistake, but pleads something in Bar or which the Pfeff. takes issue, and the right of the matter is found for the Defendants. The Pfeff. shall have no other action.

Suppose the pfeff. in Trover states a demand & judge that omits to lay a conversion. His declaration is bad and it is demurred to. He may maintain a second action in defaulting the conversion. But suppose the Pfeff. instead of demurring pleads a release & the Pfeff. takes issue w^t it, & judgment is for the Plaintiff, the Pfeff. is barred from a second action. He has judicially upon a plea which shows conclusively that he has no right of action whatever for the sum aforesaid. *B. Blox. 207. Show. 120. or Skinner 120.*

A demurrer should always extend to the whole of the pleadings on the other side unless a part of that pleading is answered in some other way. This follows from the general rule, that the pleading on one side must be co-extensive with what is alledged on the other, otherwise the pleading is bad. *Sic. Com. 10. Plea. E. L. Lawes 171.*

It is to be observed that a demurrer and indeed anything that raises an issue in Law reaches thro' the whole record & attaches itself upon the first affidavit that does not in the pleadings. It is usually said it attaches itself upon the first affidavit. This is incorrect.

So if the parties join upon the replication of the Plaintiff upon his affidavit upon the whole record. Suppose the declaration insufficient, the Plaintiff's affidavit insufficient, & the demurrer joins more must be given for the Plaintiff for a bad pleading.

Pleads and pleadings

16)emur et
11)

plea is good or? for a bad declaration. Suppose declaration
good, the plea or Bar bad, the replication. But if Df. demurs
to the replication. Then the question, for all I raised is
whether the replication is sufficient? but judgment
must be rendered against the Plaintiff, for the plea is
bad, and a bad replication is good enough for a bad plea,
in Bar.

But if the plea in bar were bad only as, form and a
bad replication and a don error, judgment w^t go aginst.
the pff. because by the replication he has waived all ad-
vantage to be derived from an informal plea in Bar.
Wob. 36. 199. & Co 110. 3 60 52. b. Sart 519. Con pleading. 7. 35 in 244. 8 60 17. o.

But there is a class of exceptions to this rule. The
objection obtains in cases of debt on Bonds for payment and
of covenants, awards &c. In declaring on a Bond if the De-
fend. pleads an insufficient bar and the pff. in his reple-
tation assigns no sufficient breach & Defendant demurs. Let
shall have judge. Yet here the first defect in point of
form is on the part of the Defendant. The reason is in debt
on Bond the cause of action never appears until the rep-
lication. So the replication is merely a supplement to the
declaration, as soon as the Defendant puts the condition up
on the record the whole contract appears, & then the cause
of action appears in the replication. 3 60 52. 8 60 120 29. b.

133. L Ray. 1080. b. 60 133. 221. And when there are several pleas or
Bar to or Df. &c. as under y^t stat. of law there may be, varying on what goes to the
whole debt, is demanded to open & sufficient, pff. will be rendered for Df.
to the other causes not his. For altho all y^t defences in forms v. his
bad plea, still this is sufficient, & it appears from y^t whole record that
pl. & t. ought to be barred & judgment rendered for Df. 2 Bar. 744. 1 Land, 30.

Pleas and pleadings.

Memoirer to Evidence.

This is a proceeding of much nicety, though it is a strictly rational one.

In certain cases where the point terminates in an issue, in fact, one party may take the examination of the cause from the Jury to the Court by demurring to the evidence which the adverse party exhibits in support of his issue. As say in certain cases, i.e. when a proper foundation is laid for it. And this demurrer is always to be taken before the party demurring exhibits any evidence of his own.
Mcay's 404. Inst 72. Ch. P. 313. Root 570. Atly 18.

It is to be observed that the relevancy of the evidence, i.e. whether it conduces at all to found the issue, its applicability, pertinency is also matter of Law to be determined by the Court. Its relevancy being ascertained, the question how far it conduces to, from the issue or fact to be ascertained, is matter of fact to be determined by the Jury, for it is a maxim of Law that judges are to determine questions of Law, and Juries questions of fact. Doug. 360. 2 H. B. C. 205.

It never can be proper then to demur to evidence which is clearly relevant to the whole issue, however weak it may be, and evidence is always relevant to any issue when it conduces in any degree to prove the issue.

The Demurrer in this case puts an end to the question of fact, refers to the 1st. the application of the Law to the question of fact. Shown in evidence of course the demurrer admits the existence of the facts shown or evidence by the person demurring, & the other当事人 admit their legal operation in his favor, i.e. their pertinency to support the issue. Inst 72. 2 H. B. C. 305. b.

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Demurrer to Evidence.

In the nature of the thing, therefore, the law must be first ascertained, because until this is done, the question of an cannot possibly arise. Matter of Law is a conclusion from matter of fact. If there were no facts existing, there could be no Law existing; & the principle of Law can admit of no application except to facts. The question is whether this evidence is pertinent to support the issue, but this evidence must first be shown. 2 W. Bla. 205-6.

{ Section VIII.

A Demurrer to evidence, is never taken until issues in fact is joined & evidence offered in support of that issue. And here I w^t observe the difference between a Demurrer to evidence, and a Demurrer to the pleadings. The latter, as the very words import, is taken to allegations adduced on the other side & can never be taken after an issue is joined. Th^e former is never taken to any allegations nor to any part of the pleadings and is always taken to the evidence after the issue is joined.

When the whole evidence exhibited on one side is written it may be always demurred to by the other, and the party exhibiting the evidence must join in the Demurrer or waive the evidence.

Thus if the plff. in Ejectment exhibits a deed as the evidence of his title, or if a debt be sh^d. adduce a covenant under seal as evidence of the debt, or when in general any instrument is adduced in support of an issue, it may be demurred to. 5 Co 104. 3 Bl. L. 372. 11 Moo 570. 18. N. L. 313. C. 6. 7. 12. 18. 372. July 106.

But whether a party exhibiting parol evidence demands to be obliged to join in the demurrer is not fully settled in the old authorities, but now the principle seems well settled. The old opinions are contraditory. In Bro. C. it is said he is not

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Demurrer to Evidence,

obliged to join, because parol evidence is uncertain, & therefore ought not to be admitted. Bro. E. 51. 560 104. 1 Law. 83. 14 and 72.

As to this question the five following rules are to be observed.

1. It is clearly settled that in such cases both parties may agree that the evidence shall be admitted, because there is no room for the objection of uncertainty. Bro. E. 75. 2.

2. It is fully settled that if one party introduces parol evidence to prove every definite fact, the adverse party by admitting the fact absolutely on the record, may demand to the evidence & oblige the other party to join in the demur or waive the evidence.

Thus suppose in an action of Trover, the plaintiff offers evidence of a negligent keeping to prove a conversion. Now if the defendant will admit the fact that the goods were lost by such negligent keeping he may demur. And in every case where the evidence is introduced to prove any definite fact, the other party by admitting the truth of that fact on the record may answer to it. If this fact is the very fact in issue it w^t be ridiculous to demur to it but he may. Atly. B. 276. Bl. 201.

3. It seems to be now settled, though formerly doubted, that if parol evidence exhibited in support of an issue is certain, i.e. clear, distinct, & explicit, the adverse party by confessing this evidence to be true, may demur to it & compel the other party to join in the demur, or waive the evidence, for confessing that evidence to be true, which is direct & explicit, is clearly a confession of the fact itself. But confessing the evidence to be true as given in by the party will not always entitle the other party to demur 276 Bl. 206. for

Pleadings.

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4. If the evidence produced is loose & indeterminate the adverse party cannot demur to it, without admitting on the record the fact which it tends to prove. But by making such admission on the record he may demur to it whether the evidence is written or parol. Loose & indeterminate evidence is not explained by any example or by much reasoning why it however is clearly evident something contradistinguishes from that which is certain. I suppose it is such as the witness himself is not certain about, such as he does not positively declare. As when the witness says "I am pretty positive" - such was my impression at the time. If the evidence in this form were demurred to it will be impossible for the Court to make any inference at all. The jury to whom might infer that the fact really existed as the witness believes it did, but the Court cannot make such an inference. And if the evidence were thus demurred to, the party demurring, w^t. deprive the other party of the privilege of having his evidence weighed by the jury. The fact must first be determined before there can be a demurra, but when the evidence is thus loose, there is no fact ascertained. The party demurring must therefore admit the fact which the evidence adduced tends to prove.

Take the example in Brown. The pl^t wished to show that the property was lost by the negligence of the defendant & thus that there was a conversion. What this, say, negligence does not prove a conversion, but this is a question of law to be determined by the C^t. Suppose then a witness says he saw this property as he believes in such an exposed situation. Demurring to this would would not be concerning to the

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the fact that the property was in this situation. But the party may admit the fact & then demand and therefore unless he admits this fact, the other party is not obliged to join in the Demurrer. Indeed he ought not, because it will be referring to the Ct. a question of fact. Scott 4^o 104. 2 H. Bl. 207. S.C. P. 313.

5. There is another species of evidence different from those named, viz circumstantial evidence. And here the rule is this. If the evidence is circumstantial, the party must admit every fact & every conclusion, which the evidence conduced to prove, i.e. every thing which the Jury might infer from it, and then he may demand to it. Now if the party might demand to it without the conclusion and inference, he might forever prevent a party from proving, as full by circumstantial evidence, and the Ct. are never judges of inferences from facts. Circumstantial evidence is most frequent in Criminal cases. Day or Doug 114. 127. Bul. 58 P. 313.

Circumstantial evidence is that which proves facts, which facts themselves conduce to the proof of other facts. Then are the rules applicable to parol evidence and the two latter to written also. Stiles 22. 34. Atly 18. 2 H. Bl. 207.

Unless these admissions are made in the cases where they are necessary it is incompetent for the party to demand of course the other party is not compellable to join.

For observe it is a rule that when it is competent for one party to demand to evidence it is the duty of the other to join in the demurrer.

But suppose the party demanding does not make the admissions which are required, & the other party actually joins in the demurrer. the Ct. can render no judgment, because

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because the demurrer refers to the Court, the truth & weight as well as the relevancy of the evidence. This w^t be to the disadvantage of the party, but the C^t. can make no inferences from facts whatsoever. The proceedings then are altogether impartial, & the course then in this case is to award a "verdict de novo". (S. N.P. 313, 4 Bac 137, 276, Bl. 209.)

Our Sup. Ct. in 1787 decided that in a demurrer to evidence before a single magistrate the party producing the evidence cannot be obliged to join in the demurrer. The reason given was an improper one - it was this that a demurrer to evidence before a single magistrate w^t tend to entangle his proceedings. This is a proper subject for legislative consideration, but a Ct. have nothing to do with it. If the party has a right to demur, the right is strictly just & the Ct. cannot interfere to prevent the use of this right on account of political considerations. P^r by 352.

The same Ct shortly after decided that the party was not obliged to join in a demurrer to evidence if the evid^eence was almost all written and all admitted. The decision I cannot understand, unless they intended to establish a rule that there ^{s^t} in no case be a demurrable evidence in this State, or that there can be no such demurrer unless the evidence is all written. I suppose the latter was their intention. 2 Swift 257.

The point in issue upon a demurrer to evidence is this. Is the evidence sufficient to sustain the claim. It is here to be observed however that the whole evidence exhibited is to be deemed valid to and not any fraction.

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fractional part, for the question is not merely whether it is relevant, but whether it is relevant & sufficient.

And as the question is whether the evidence is sufficient or law to sustain the issue, it follows that no advantage can be taken of such a demurrer of any defect in the pleadings.

Since after the demurrer is overruled or otherwise determined advantage can be taken of any defect in the pleadings by a motion on arrest of judgment etc.

Lord Mansfield says that advantage is taken in arrest of judgment as it is after verdict. On principle I st^d doubt whether it did after a general verdict. I think it will be decided on the same principles as after a special verdict, a judgment by default, or n*o* dicit. Not a general verdict after ~~cum~~ ^{cum} defect, for such general verdict supplies by necessary implication facts omitted in the pleadings, because it is presumed the Jury are in the direction of the C^t. w^t not have given such a verdict unless they had found those facts. But on the case of a demurrer to evidence the whole facts are on the record and are seen by the Court, consequently there can be no such presumption. Doug. 213. B. et A. P. 313.

It seems questionable whether in law advantage must be taken of any defect in the pleadings upon a demurrer to the evidence, by motion on arrest, alone and not do this when an issue in fact is referred to the C^t. This demurrer to evidence is tried by the C^t. It is a substitute for the trial by the Jury. 2 Swift. 258. Such idea has been embodied in § 100 of Rivers, 2d Edg^t 258.

The party whose evidence is demurred to may always do so before a judge of the C^t. Whether he is bound to join in the demurrer, if there is no colourable reason for the demurrer they will not compel him to join to prevent

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a delay of justice or frivolous pretences. Allyn 18.2 Roll R. 17. B. N. P. 314. 4. Bau 136.

In demurrer to evidence to a joinder in or the demurrer the usual course is to dismiss the jury immediately. And then the court of inquiry to assess damages (if necessary) is afterwards executed, because the operation of a demurrer is to take the trial of the cause from the jury to the C. C. Court.

14.3. L. Ray. 60. Sal. Ch. 284. B. N. P. 314. Ploud. 410.

Sometimes however the jury are sent down provisionally, before the demurrer is determined as the demur. is determin'd. so are the Dam's. Dougl. 212.

According to our practice there is no trial of inquiry. The jury are immediately dismissed & the dam's are apptd by the C. C. 18.2. 570. 2. Swift 258.

But if unproper evidence being objected to is admitted by the Judge it can not afterwards be demurred to. To demur in such a case will be to call in question by a demurrer an interlocutory judge of the C. C. Besides it is to refute the C. C. a doubt of law, it had once determined. The proper remedy in such case is by a Bill of Exceptions. Sal. Ch. 284. B. N. P. 314.

And if a party offering to demur to evidence is overruled by the C. C. his remedy is likewise by a bill of exceptions. 9. Co. 13. 2. Coro. L. 249. 34. 13. 57. 2. 314.

The whole proceeding in a Demurrer to evidence is under the direction of the C. C. to determine what admissions the party shall make. 2. Roll R. 17. 17. B. 208.

The mode of demurring to evidence is when the party demurring must first state the evidence upon the record. He then alleges that this evidence is not sufficient in law to maintain the issue and concludes with praying judgment, that for want of sufficient matter shown in that behalf in evidence, the jury may be discharged from giving a verdict. The defendant when he demurs concludes by praying judgment that the jury may be discharged and that the pess. and that the pess. may be barred of having his action. Sal. Ch. P. 314. 2. H. 15. C. 200.

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Motions in Arrest.

Secture IV.

To arrest the judgment is to stop or stay it, in other words to prevent its being rendered. And this is done on motion introduced by writing and entered on the record. By this is not meant that there can be no arrest of judgment without a motion, for the C. if they think proper, in many cases may "ex officio" arrest the judgment.

This motion is in most cases made after an issue is tried & a verdict found. Few motions in arrest are made until after a verdict found. This however is not universally the case, for the judgment may be arrested after a default, or after a demurrer to evidence has been overruled. If there is a good cause for arresting judgment a motion may be made in arrest after default, for it was not necessary for the party to plead. 3 Bl. 386, 393. 2 Stra. 127. Doug. 2080, 2081. 213. 23 Eng. 904.

According to the English practice, judgment is arrested for intrinsic causes only, i.e. such causes as appear on the face of the record. Causes extrinsic are to be taken advantage of by filing a Bill of exceptions to some interlocutory judgment of the Court, or in some other way. Where the declaration differs from the writ and the writ sounds in contract, and the declaration in tort, the judgment must be arrested whatever the proceedings may have been, because the writ did not authorise the Court to take notice of such a declaration. The C. had no right to frame such a declaration, because he was not authorized by the writ. 3 Bl. 393.

So also when the verdict differs materially from the issue, judgment must be arrested, for when this is the case the issue is not found either way. There can no doubt

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thing, as an issue, found where there is a material difference between the procedure & the issue, and where there is no issue, found where can be no judgment. The judge follows from an application of the law to facts, but there are no facts found, consequently there can be no judgment.

Thus suppose in Maryland, the plff. alleges that the Defendant, charged him being a bankrupt, with being a Bankrupt. The Jury finds that he said he will be a bankrupt. This evidence is materially different from the issue, off the Jury had expressly neglected the issue, between the particular grounds as they arise, & w^t have been good. 3 Bla. 393.

So if the plff's. Declaration is altogether insufficient, & he has obtained a verdict judgment will be avoided, because he shows no right of action. A verdict can give only the truth of the facts contained in the declaration. But on the supposition, the facts do not disclose a right of recovery, consequent by the Court cannot give judgment. 3 Bla 393.

So on the other hand, if the Defendant's. plea on which he has obtained a verdict discloses no legal defense to the action, judgment may be arrested by the plff. Thus in an action of Debt, the Defendant pleads "not guilty" and the issue is found in his favor. The finding knows nothing material in the case - finding that he is not guilty is not finding that he is not indebted. So if he pleads that he has always been ready to pay, & that the plff. has never called upon him, judge in the same reasons may be arrested after a verdict in his favor. Cro. 6. 778. 31 Bla. 393.

The only difficulty under this head, is the application of the general rule to particular cases. There is demand to

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to explain the subject by laying down the general rule in various forms.

The material enquiry here is, for what kind of defects in the pleadings, judgment may be arrested.

It is a general, very unusual rule, that after verdict, judgment may be arrested for any cause which after verdict, judgment may be affirmed for error. This rule is of much consequence because if you find in a particular case, a defect which may be assigned for error after verdict, & judgment you can sustain it, it may be made the ground of a motion in arrest. The question still arises what defects in the pleadings after judgment & verdict, may be assigned for error? ^{n. 2. Rule 716.} ^{3. 383.} ^{4. 383.} ^{5. Com. 174.}

It is a general rule that if the statement of the title or cause of action (that only) is defective, the declaration is aided by the verdict, altho it w^tll be ill on general demurrer. But, if this title or cause of action appears itself to be defective, it is not aided by verdict. ^{3. 383.} ^{4. 383.} ^{5. Com. 174.}

Suppose on an action of trespass, the plff charges the trespass all well except that he does not lay a day certain on which it was committed. The question is whether this omission is aided by verdict? It is settled that it is not. ^{3. 383.} ^{4. 383.} ^{5. Com. 174.} ^{6. 383.} ^{7. Com. 174.} ^{8. 383.} ^{9. 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Where are pleadings.

(Motions in Arrest.)

verdict? Obviously not, because the Court cannot know that the defense is in the statement. Suppose the defend. did, but for away a certain horse of the value of 100\$. as laid in the declaration, was it the property of the plff. or was it in his possession? It does not appear & the Court cannot presume it. Of course the Ct. cannot know that any right of the plff. has been violated. Here then there is a defect in the plff's title.

Again. An action of slander is brought against the Defend. for saying of the plff. "you are a ~~Scot~~" A verdict is found for the plff. Is the subject named by the verdict? Clearly not, for the depiction does not go to the statement of the cause of action, but to the cause of action, for the words are not actionable & therefore there is no ground of action. Doug. 458, 4 Side 184. Comp. 825. Sack 363. Rule 4. § 320. 2d Inst. 2043.

Again. Suppose that in an action vs. the Indorsement of a Bill of Exchange, the plff does not allege in his declaration, that he has given notice of non payment by the drawee. This is essential to the plff's right of action. Now is this defect cured by a verdict? No. This title appears defective. At any rate, it cannot be presumed that the fact of having given notice existed and the want of it is a want of title as appears in his declaration.

The same distinctions applicable to the declaration of the plff. apply to the defense pleaded by the defend. of the statement of the defense of the defend. only is defective, a verdict will cure it. But if the defense itself is defective a verdict will not cure him.

This is to an action of Dñe. the defend. pleads "not true" and verdict is found for him, this is a defect in the defense

Pleasants, pleadings.

(Motions in arrest.)

defence itself. But suppose he pleads accord & satisfaction & omits to state the day on which it was made and accepted, and a verdict is found for him, the defect is no ground for a motion in arrest, because the jury have found that there really has been an accord & satisfaction. See Supra. also Bro. E. 772. Corol. 4. 97. 4 St. Tr. 4. 72. 12 Mod. 2. 92. 107 R. 343. 3. Barr. 1728. 70. 16. 378. Salk. 3. 365. Buls. 373.

Another general & universal rule is, that any defect in the pleadings which will support a motion in arrest of judgment, must be such as to ^{be fatal if not a} be fatal on genl. Damages.

But this rule does not hold & converse, for it is by no means a rule that whatever will support a general demurrer, will support a motion in arrest, because the verdict canst many defects, which on general Damages would be fatal. 3 Bla. 393. 9.

And the reason why this rule does not hold & converse so is, that if the declaration omits some particular circumstances, without stating which, the party claiming the verdict ought not to have obtained it, but which fact omitted is implied from the facts stated, the defect is void by verdict because the jury are presumed to have found that fact. Thus if in Freshfap v. Town the plff. omits to state the value of the goods taken or converted, this declaration is ill. on demurrer, because there is no rule of damages, but if issue is taken and a verdict found for plff. the defect is cured, because the jury by this verdict have ascertained the fact omitted. In other words the plff. has proved the value of his property converted by the defendant. i.e. the value of the goods was given as evidence to the jury. Ep. 407. 6 C. & B. 389. 6 C. & B. 44.

Plaus and pleadings.

Motions in arrest.

Take the other case of a trespass laid without a day certain. if we go on the ground that it is ill on general information. The only substantial reason why the day ought to be stated is that the trespass may be laid before the date of the writ. It is certainly ill upon special information. But after a verdict obtained in favor of the party. the presumption is that the trespass was committed before the date of the writ, because it cannot be presumed that the Jury would find the defendant guilty without the trespass having been committed before the date of the writ.

In other words the reason why the verdict concludes facts is that after verdict the Ct. will presume that all the facts not alleged and which are implied in those alleged and found, were proved to the Jury on trial.

As in the case of a judgment pleaded without laying of claim. The Ct. will presume after verdict that there was laying of claim, because a judgment implies laying of claim, and the Jury have found a judgment.

In other words still. The Ct. will presume in support of a verdict every thing on point of fact which is necessary to warrant the finding. See auth. supra. Bal. Oct. 7. 1821. Doug. 688.

Or on still other words. The Ct. after verdict will presume every thing which it was necessary for the party to prove for the purpose of proving his claim. Doug. 683. 1st. N. 145. 114. 131. 132. Doug. 822.

On the other hand the Ct. cannot after verdict require to assume any fact which it was not necessary to prove, for the purpose of proving the claim. And this negative, in proportion

Propositions they will be laid down hereafter for the purpose of being more distinctly considered. As to the affirmative propositions then, the Ct. will presume every thing implied in the facts found by the jury.

If in the spray or trover the plff. omits to state the value of the goods, so that there may be a rule of damages. This is unfair, but the def. takes issue without taking advantage of the objection & the jury have found the value. They have found what before was uncertain by reason of the omission. They have then supplied the omission. It was necessary that the plff. to prove the value of the goods, because if they were of no value, the jury ought not to have given damages. It is a fair presumption that they have not only found a value but the value. ¹³⁰⁵ Lath 389. 3132a. 394. Salk 152. ¹³⁰⁶ Long 810. 116344. 38a 37, 78. 26. 18. 2

And if in his declaration the plff. should state a future day, after the trial, or time of pleading, the defect would be cured by a verdict, because this is laying an impossible day, and laying an impossible day is in operation of law the same as laying no day at all, and then the case comes within the general rule. ¹³⁰⁷ Lath 389.

If the grant of an advowson is pleaded without averring that it was by deed, & it is found by the jury, the Ct. will presume that it was by deed, because the grant of an advowson can never exist except by deed. It is presumed that the Ct. will not let any evidence go to the jury which is improper, but if the grant of an advowson was to be proved without deed it would be improper evidence. That the verdict is said to ascertain those facts, etc., from the inaccuracy of the pleadings does not appear. 3 Bl. c 317. Willm 34. 2. 11. 1. 6. 10. 11. 12.

Pleas and pleadings.

Motions in Arrest,
Lecture XIV.

In the other hand nothing after verdict can be presumed to have been proved except those facts which are alleged & those necessarily implied from them. Or nothing will be presumed which in point of fact was not necessary to warrant the finding - or in other words still - nothing will be presumed to have been proved which it was not necessary to prove in proving the facts found. This rule, in all its various modifications is nothing more than what is laid down by Mr. Abbott & Field in saying that a defective title cannot be cured by a verdict.

Suppose then the declaration is wholly void of substance. Issue is taken upon & found for the plaintiff. In such case the declaration is not aided, because there is no fact to be presumed which can make the declaration good. Again it is due for calling the party "a Jew." There is no semblance of a cause of action on favor of party. He cannot have judgment, because there is nothing which can be presumed, which will show that he has a cause of action. And if he claims judgment, he must claim it on the ground of something presumed. 3 Bur. 1728. Doug. 658.

So also if any fact is omitted which is essential to the right of action & which is not inferable from those facts stated & found, this fact cannot be presumed to have been proved, & the verdict does not aid the plaintiff. 12 T. R. 143.

This suppose is an action of trespass, or covenant, in form as to of a condition precedent it is not arising. The general issue is not pleaded, and a verdict is found for the plaintiff. His declaration is bad, and the plaintiff cannot have

judgment, because the performance of the condition does not follow from the facts stated. The Declaration contains a statement of the contract & the non-performance of it. This is a proviso and found by the Jury, but does this prove or even raise a presumption, that the plff. has done what he ought to do? also. The things, &c. furnish no evidence of the performance on the part of the plff. Indeed it is obvious that the facts omitted in this case were not necessary to be proved to warrant the Jury, or finding those facts which are stated. They find the facts which are alleged, but the fact of performance on the part of the plff. is altogether collateral to those alleged. 7 H. 6. 10. 1st. R. 64. 5. 7 Ibia. 125. 4 Ibia.
472. 8 Ibia. 127. 8. 2 7 C. Bl. 574. B. 42. 2. 321. 322.

Again - A sues B in an action on the case for an injury done by an animal kept by D. defend. It seems to be a certain kind of mischievous, but omits to state the species in the Defence. The Jury find the C. boni, & will, they find the facts alleged viz. that D. had kept a dog used to bite sheep & that he bit the plff.'s sheep. But this does not prove that the D. defend. was knowing to the fact of his being used to bite sheep. This is not inferable, from the facts alleged, & found by the Jury. 2 Salk 662. 3 Ibia. 12.

Again - In an action a/c. the Indorsement of a Bill of Exchange, the plff. omits to state a demand of the acceptor or notice to the indorser of the acceptor made to him. D. defend, that the general issue of a verdict is given, to the plff. What facts do the jury find? They find that the bill was indorsed & that the bill has not been paid. These facts however do not prove that there has been a demand. Then

Pleads and pleadings.

Motions in arrest.

do not even involve a demand. But suppose the does State a demand & refusal, but alleges no notice. Now notice is absolutely necessary to entitle the plff to an action. But suppose a demand & refusal, does this prove that notice was given to the defendant? The existence of these facts does not all prove that the other existed. Doug 554. - Bulk 662. 3 Bulk 12.

And it is very material here to be observed that the Ct. cannot, on specific issue presume any fact omitted, which is point of Law merely, as necessary to support the verdict. The case of a judgment, where livery of seisin is not alleged, and is presumed, is not an exception for the judgment is the specific thing pleaded.

To presume after verdict a fact omitted merely because it is necessary on point of Law to warrant the verdict, would be to presume on the idea, that the jury are competent judges of the law. On this supposition, every defect w^d be cured by verdict & there w^d be no such thing known in our Law as a motion or arrest.

Thus suppose on Appeal, no consideration is alleged in the declaration. The jury d^t find a verdict in favor of the plff. Now the consideration is not necessary or point of fact to warrant the verdict in favor of the plff. The jury dispossessing of finding that the deft. did a positive promise if there was a consideration, was alleged in the declaration. Of course a statement of a consideration was not necessary to warrant the jury in finding as they did. But on point of Law the C^t not have assumed & presumed unless there was a consideration. The verdict means only this, that the plff. has proved the matter alleged

Pleads and pleadings.

Motion in arrest.

in his Declaration. Of course the plff. cannot have juryment with the clc. cannot presume that this point of Law was necessary to warrant the finding. *Wood v. J.S. No. 351.*

I'm bound this point was decided otherwise. I think it cannot now be Law. *Hickey 400.*

This I have explained the true principle on which a verdict is said to cure defects. I have taken the case of an insufficient declaration but these rules apply to an insufficient plea where the verdict is in favor of the Difend.

From the view I have taken it follows that a motion in arrest after a default, or a special verdict, or a demurrer to evidence overruled operates, as a demurrer. There is nothing cured in these cases for there is nothing to be presumed. The clc. cannot presume anything not alleged because there is no verdict in fact found. *2 Bur. 900. 2 Stra. 127. 160. 171.*

But it is to be observed that in some cases judgment cannot be arrested for the greatest possible defects on the part of the party who has the verdict, or even the nothing is cured by the verdict.

And in such cases the rule is this - If the verdict is in favor of that party, who upon the whole record appears entitled to judgment, he shall have judgment however faulty the pleadings on his part on which the issue is taken may be.

Suppose the Declaration is radically defective, i.e. wholly insufficient in Law. The plea in Bar is a perclusor. Issue is taken on the plea in Bar & found for the Difend. The verdict here will not aid the plea in Bar, but there can be no arrest of judgment, for as the Declaration is radically defective the plff. is not entitled to a recovery. A weakly plea in Bar

Pleadings and pleadings.

Motions in Arrest.

is good enough for a worthless Declaration. This motion in arrest looks thro' the whole record and attaches on the first substantive defect, which here is on the declaration. He must be unable to arrest judgment in favor of plff, & cannot again arrest judgment in favor of the D^refend. because the plff's declaration is insufficient. 860 120. 133. 41 Bac. 131. Hob. 36. 109.

Suppose the declaration is good, the plea in Bar and replication bad, issue is taken upon the replication & found for the plff. Now the D^refend. cannot arrest the judgment. The verdict to be sure has not aided the replication, but the plff. shall have judgment for all the good pleading on his part. There is no defense made to his claim. The replication is good enough for a frivolous plea in Bar. The motion in arrest attaches upon the first defect which appears & that is in the plea in Bar. Hob. 36. 960 100. 32 Law. 244.

And when judgt. is arrested in pursuance of a verdict, i.e. where the C^t. refuses to render judgment in favor of him who has obtained the verdict, judge. in favor of him agt. whom the verdict is found, may be immediately rendered if one of the jurors agt. whom the verdict is found appears on the whole record entitled to judgt. he may immediately have it notwithstanding the verdict. See supra.

Thus if upon the Declaration is wholly insufficient the plea in Bar sufficient or insufficient, the plea in Bar is traversed & verdict found for plff. - If in pursuance of the record is arrested, & judgt. entered for D^refl. for here it appears on the whole record that the D^refl. is entitled to judgt. One on the other must be entitled. The plff. is not because he has shown no right of action. It must then be for D^refl. Hob. 36. 199. 200. 860 120. 1 Barr. 301. to 306 360 133.

Pleadings and Pleadings.

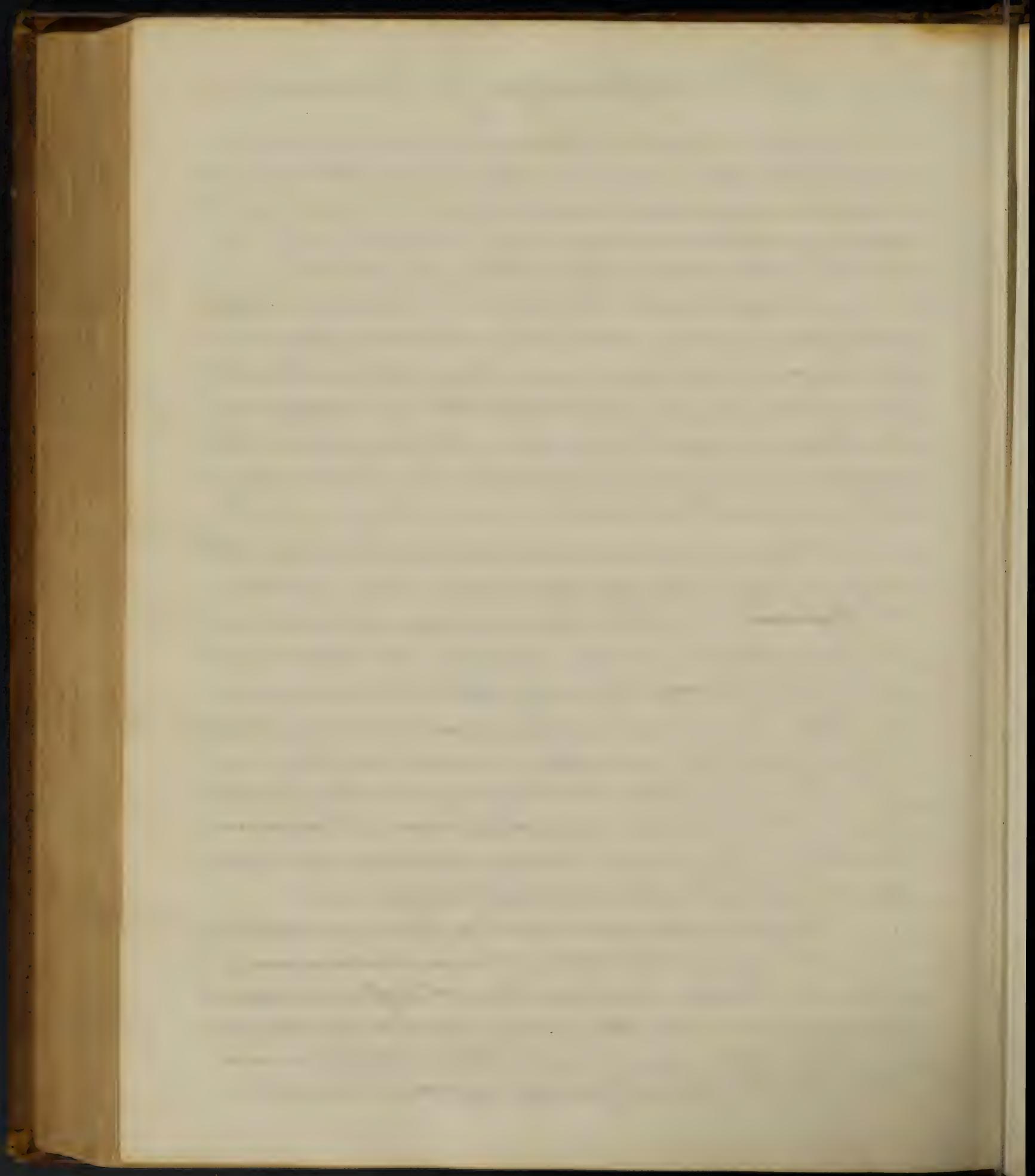
Motions in arrest.

Again. Suppose the Declaration good, plaintiff's prima facie case & a replication good or bad, and your found for defendant. Now in pursuance of the verdict must be arrested and rendered for the plff. because there is no defense to the Declaration on the record upon the whole record the plff. is entitled to judgment. 11 Mu 301 b.

But it does not happen that in all cases the party in whose favor judgment is arrested is himself entitled to judgment, for if the verdict is found upon an immaterial issue so that the Ct. cannot know from the record for whom to render judgment, a repleader may be awarded on the judgment's being arrested. The judgment is arrested and the Court orders the parties good repleader.

This is a case before mentioned. In debt on obligation to pay a sum of money on or before a certain day. The Defendant pleads that he paid before a certain day. The Plaintiff traverses this allegation and verdict is found for the Plaintiff, now the finding is that the defendant did not pay before, but the declaration shows that he was allowed to pay at the day, and this he might have done. The issue thus being immaterial, judgment will be arrested, and the Court will order a repleader, that is, give the plff. an opportunity to take a material issue. 11 Mu 344. 3 Bla C. 345. Lanes 175. 6. Stra. 994. 2 Bent. 196.

Again suppose in an action of affreightment by Executor he pleads that he did not assume & promise, & verdict is found for the Deft. Now this is an immaterial issue, & the plff. never alleged he assumed & promised, but that of promise was made by testator. Then the judgment will be arrested & a repleader ordered. 2 Bent. 196. 3 Bla 391. 2 Lanes 349. 1 Lanes 228. 2 Crof. 434.



Pleas and Pleadings.

Stipendary.

Repledgers.

So also if the Proclamation and plea on Ban are both good & the Pltf. traverses an issue of advice, part of the plea in Ban that has a word in it, a repleader may be an order, because the issues differ in its noting, between the parties. See E. 345 Bans 1756.

But if the plea in Bar is wholly insufficient & the plf. covers the whole or only a part of it, there is no replader & cannot be arrested, for it appears that no manner of taking the issue could have avoided the Defend. for his plea in Bar was altogether insufficient & if he was to take a new issue he did not take one more material, and a replader is never to be awarded for a defect which cannot in any manner be remedied.

So if the declaration is good, the plea in bar is sufficient, & the plff. takes issue upon it. & defendant has a verdict, judgment will be entered, but there will be no respondeat for a more material issue. cannot be formed upon such a plea in bar. 11 C. C. L. P. Ch. 172. Sec. 2. Day 924.

On a repleader awarded the pleadings begin de no.
20, at that stage of the pleadings, where the first deviation
from the rules of pleading occurred. Thus if the plea in Bar
is sufficient, & the plff. traverses an immaterial part of
it, and verdict is for plff. judgment will be arrested and a
repleader awarded, that the plff. may take a new trav-
erse, or otherwise answer to the plea in Bar. Comp 510.
Salk 173. 216. 579. 3 Bl. C. 395. 1 Mod 2.

But it seems a pleader is never awarded for the immorality of the issue in favour of that party who tends the others.

Please accept my thanks and best regards.

Wipkader.

I know of no decisions in the books on this point, but I take it to be law. 2 Guy. 380; 600 of 501. 17 R. 132. 644. 1 Sand 308. 2 Dure 319.

If this is the case case stated, where Mr. B. took issue upon an immaterial part of a good plea in Bar, & verdict had been found for Defendant. Mr. B. could take no advantage of the trial fact. He might have made a better traverse & he admits what he does not traverse. -

It is here to be observed that an issue may be material if found in one way, and immaterial if found in another. And hence it is, that the an immaterial issue is an incurable defect & not aided by verdict, yet an immaterial traverse is but matter of form, though the issue is found upon the traverse. The latter is but matter of form, because the party to whom it is tendered may always abandon it, so a traverse if found one way may be material, and if found another may be immaterial. -

This presents a very strange case. Here the transverse
rib before removal is matter of form & yet the verdict
in some cases makes it an incurable defect. The finding
may make it material. # 9.130.994. 200.170. 3136. 395.

A gold medal is never awarded after a class career, it
is given at the graduation.

Issues and pleadings.

Repleader.

is only after an issue in fact, for by a demurrer the parties have put themselves upon the court. In S. C. v. S. a contrary rule is laid down, but it is denied to be Law. A repleader is to be awarded only in those cases, where the Ct. cannot determine from the record for whom to render judgment; but here it is impossible for the Court to render judgment upon a demurrer, for the whole record is submitted to them by the parties.

560. 52. P. 42. 6 Mod. 102. 3 Lev. 20. 440. contra. - Stat. 146.

If a repleader is awarded, where it ought to be denied or denied where it ought to be granted, the judgment will be erroneous. In awarding a repleader it is matter of strict right. 579. 6. Mod. 2. Pearson & Bowles v. Chester. 10 Days. (a & c. come next)

All Com. Law repleaders were sometimes awarded before trial, but since the Stat. of Jeofails they are not awarded until after issue found, because under that Stat. the finding may make the issue material.

There can be no repleader after a default, or discon-
tinuance, for there is no issue. The question here will arise
upon the whole record who is entitled to judgment. Bulk. 219.
579. 6. Mod. 6323. 6 Mod. 3.

If the issue is clearly immaterial, i.e. obviously un-
certainly so, it seems that even now a repleader may be
awarded before trial, tho' this is seldom if ever done.

11 Bac. 20. 103. 6 Mod. 2. 6a. 371. 4 Leon. 19. 3 Halle. 664. 579.

A repleader can never be awarded on a writ of
error, because a Court of Errors has nothing to do, but to
decide from the pleadings as they stand who is entitled to
judgment. 2 Burn. 319. 4 Bac. 129. 2 Div. 12. 6 Mod. 102.

Pleadings and Pleadings.

Repleader.

Thus far of motions in arrest and Lecture XVII.
repleaders for defects in the pleadings.

But judgment may be arrested for defects in the verdict.
So if the jury find only part of the issue omitting what is material, judgment cannot be rendered upon it, & a verdict de non^s ipsius. The reason is, in this case a material part of the facts on which judgment ought to be rendered is not ascertained and the Co. can render only on what is ascertainable. East. III.
6a. Litt. 227. West. 27. 12 Mod. 5. 5 Bac. 296. Cro. E. 103. 2. Ray. 1521. 6 Bra. 1089 burnes auth.

But this is not so, if the thing omitted is immaterial, if it finds all the substance it is sufficient, for then there is sufficient ground for rendering judgment. 3 Bac. 244. Collier. 133.
Smy. 344. Inst. 227. West. 27. 12 Mod. 5. 5 Bac. 27. 12 Mod. 5.

And as the omission of what is material vitiates the verdict, so also a material variance between the verdict & issue, is good cause for arrest of judgment. As if the jury instead of finding the issue, finds what is foreign to the issue. So in case of a Bankrupt, the issue being, on the point of filing "having, owned, &c." the plf is a bankrupt &c. and the verdict goes that he said he "used to be a bankrupt". 3 Bac. 244. 2 Rob. Ab. 707. 769. 2 West. 151. Com. L. 497. 6. 600. 57.

But a verdict which finds the issue is not vitiated by the finding of more than is contained in the issue. The latter is mere surplusage. The judge is not entitled according to the maxim "utile per inutili non vitatur". Thus when the issue was whether Cox had a debt. The jury found that he had debts beyond £100. The word "beyond" was rejected as mere surplusage. 6. 600. 57. 600. 100. 400. 2 West. 151. 8. 600. 27.

Pleads and pleadings.

Replies.

These rules apply to general verdicts. And if a special verdict finds only the evidence of a fact material to the issue & not the fact itself, judgment will be arrested and a venire de novo awarded, for a Ct. cannot judicially make any inference of fact from evidence put up on the record. The Ct. by the substance of facts is to determine the law.

Hence if in an action of conversion the jury finds a demand & refusal without any conversion. Here the conversion is the act of the action. Now they do not find a fact which amounts to a conversion. They only find those which are evidence of a conversion, for a demand & refusal are only facts from wh. a jury under direction of the Ct. may infer a conversion. Barr. 1243, 10 Co. 56. 7 East 111. Esp 196 390.

And there are cases where the mode of apportioning damages will destroy a verdict & be a foundation for a motion for arrest.

Thus if there are two Courts in a declaration, one good & one ill, and the jury find a general verdict of damages, judgment will be arrested, because it cannot appear to the Ct. how great a part of the damages were suffered on the good court and how great a part on the bad. At any rate the Ct. cannot presume that they were all suffered on the good court. 10 Co. 130. Bul. Ct. 918. 2 W. 377. 2 T. 186. 328. 1 Bos & Pel. 229. 221. Doug. 362. 2 Bac. 7. 1 D. 11506. 8mu 1094.

And yet it is to be observed that in the last case supposed the declaration would be good on demurrer. This is no exception to the general rule that whatever defect is ground of an arrest, if judgment must be such as would be

Plaies and pleadings.

Replies also

(1)

bad or demurrer, for this rule relates to defects in the pleadings; but judge is not arrested in this case for a defect in the pleadings but for a defect in the verdict, for a wrong assessment of damages. This declaration would be good in demurrer because the plff. by having one good count shews one good cause of action. (Mod 27.)

But if several damages are assessed in this case upon several counts, the plff. may release the damages assessed upon the bad count & take judgment for those assessed upon the good. Thus if in one count the Dffnd is charged with having said "he is a thief" and in another "a Spy," does the jury find the Dffnd guilty & that he pay 50\$ on the first count & 50\$ on the second, the plff. may release the last 50\$ & take judgment for the other. See supra. 2 Ray 13.

And the entire Damages are assessed, yet if no evidence was in fact given on the bad count, the verdict may be amended from the minutes of the bc. so as to apply to the good count only; if the verdict stands as given in by the jury without being amended judge will arrest it. This amendment however can be made otherwise than by the jury as noted. Long 362. Stoy 513. 15. 1. 8 Ex. 134.

This rule with respect to two counts is of no great practical use in Com. except as it furnishes a principle, for we seldom if ever insert two counts. The principle is operative here & answers the same purpose as in Eng.

For a Com. of a declaration consisting of one count say two distinct causes of action one sufficient and the other insufficient and in an a general verdict is found and entire damages for your wife in question.

Pleads and pleadings.

Repleader.

As if in Slander where Defd. said at one time he is a thief and at another he is a Spy.

But still if different parts of what which is considered as one cause of action is so put upon the record that one gives a cause of action & one gives none, judge n't. will not be arrested. As if in Slander he says that D. often steals at the same time he is a thief & a liar. Having to state all the words said at the same time, & the judge option here is to suppose that the damages were applied upon the actionable words. *West. 346. 433.*

When judge is arrested in this case there is to be a new trial now awarded, i.e. a jury is to be called for the purpose of trying the cause again. But there is no repleader, for the issue is right. The deft. is on the verdict, & a repleader is never awarded when judgment is arrested for insufficiency of verdict. *Dong. 362. 87. R. 364.*

But the rules I have just laid down cannot in their nature apply to criminal prosecutions, for if in any criminal prosecution, one count is good & another is bad, judge will not be arrested after a general verdict, because the jury affirms no damages. The jury find the mere fact of Guilt. In civil cases it is the province of a jury to affect apportion the remedy, but in criminal cases, it is the province of the judge to apportion the punishment, and the Ct. will apportion the punishment on the good count only.
2 Hanc. 985. 2 Blant 627. Salk. 384. L. Ray. 886. Dong. 703.

These are the principal reasons for which judgment may be arrested according to the common law of Eng. tho they are not all. According to the English law judgment is,

Pleas and pleadings.

Proplaintor.

arrested only for intrinsic cause.

But on Con judgment may be arrested for a
nay extrinsic cause. As corruption, manifest, either
by or阴谋 of the jury. As if the jury with the opin-
ions of third persons, find their verdict upon the case
of a dice, when a game of cards, or the settling their ver-
dict upon the issue of any chance. This is likewise a cause
for setting the judgment aside in Eng. in another way.
Hirby 18. 133. 4. Sta 64. 21.

Misbehaviour of the parties towards the jury is
also cause for arresting judgment. As if one has tamper-
ed with, or attempted to influence them, i.e. if the suc-
cessful party has done it. I suppose the misconduct must
be in him & not in the party who fails in the verdict. This
judg't will be set aside in Eng. another way. 5 Bac 292. West 193.

So if one of the jurors was interested in the suit, or
was so related as to be the foundation of a principal chal-
lange, judgment will be arrested. Nay, it has been decided in
Conn. that if he is so related to the bail of the party who has sued,
so that he c^t not be a juror in case of the Bail, judgment will
be arrested. Hirby 184. 279.

Another cause for arrest of judgment is that the ju-
ry in one of them has been before arbitrator or Attorney on the
same cause, or has given an opinion upon it. All these w^t
be grounds of a principal challenge according to the prin-
ciples of the Conn. law and a judge, in such case may be set
aside in Eng. Hirby 146.

Another general rule as to incompetency of persons
is this. If trial in competency goes to the jurors impartiality

Pleas and pleadings.

No pleadings.

and is good cause for a principal challenge, it is a good cause after verdict for arresting judgment, even now:

Thus if the juror is related to one of the parties within one of the degrees which makes him incompetent, it would go to his impartiality & exclude him. He is presumed to be biased. Kirby 13. 133. 184.

But any incompetency which raises no presumption of partiality in a juror is no cause for arresting judgment. our Law requires every juror to be a freeholder. Suppose juror is not a freeholder. The verdict will not be set aside because the incompetency of the juror raises no presumption of his partiality. Kirby 184.

And further - tho' the jurors incompetency does go to his partiality, yet if the party agt. whom the verdict is given know of the incompetency in season to make the challenge, the verdict will not be set aside, because he is presumed to have waived the challenge. 2 Swift 232. Kirby 186.

And for the same reason if one of the jurors has tried the same cause in a Court below, the party cannot merely for this move in arrest of judgment or set aside the verdict, because the jurors who tried the cause below necessarily appear on the record the party & not but know them. supra.

A previous opinion founded up on a general principle of Law involved in the issue is no cause for arresting judgment or even for a challenge, for every man will have a sort of first impression. Kirby 426.

And it has been decided that if a previous opinion given upon the merits of the very cause tried appears to have had no influence in giving the verdict it is no cause of arresting judgment.

Pleas and pleadings.

Replications

That where the fact was that one of the jurors gave an opinion in favor of the prevailing party & several years before the trial, yet upon being interrogated declared he had absolutely forgotten it, - and when it further appeared that he was the last to give his opinion even after all the rest had agreed upon the verdict, it was decided to be no ground for arrest. Hardly correct, dangerous decision says Mr Gould. Kirby 82. 2 Swift. 282.

But tho' a judgment may be arrested for intrinsic cause, yet the loc. on a motion in arrest will never go into the evidence on which the verdict was found, for this would be assuming the province of the jury. Kirby 81. 87. 142. 273. 277. 2 Swift. 264.

By the way on 2 Swift. 264. there is a mistake. He says on a motion in arrest for misbehaviour in the parties or jurors a replication is awarded. This cannot be. He must have meant a writies de novo, for there is no defect in the pleadings.

Tho' it is true that in Eng. judgments are arrested only for intrinsic causes, yet it is also true that in Eng. verdicts are set aside and judgments arrested, for certain causes not appearing on the pleadings, nor in the verdict.

And this result is effected in Eng. for the same causes I have just been mentioning. But if it does not appear on record how can the jurisdiction be consistent with the question, that a judge can be arrested only for intrinsic causes. It is consistent. The mode of proceeding is this. Upon enquiry into the facts, the judge is a wise man, but then upon his posterior and they shall become intrinsic causes. In law the judge is a Bank receiver who is on the record. 3 Banc 288. 291. 2. 2. 205. 1806. 57. Straub 64. 2. 2d. 103.

Pleas and pleadings.

Repleader.

But in two cases in Eng. the same proceeding has been used in Banks. This is inconsistent as it is true with their general rule. 5 Bac 291. 1 Dren. 79. 2 Johns 83.

Neither the one nor the other of these causes is the usual one in Eng. The usual way is to have these ex tempore causes the foundation of a motion for a new trial. 5 Bac 285.

Awarding Costs.

In judgments being arrested no costs are regular & allowed on either side. For th. party moving in arrest might have commenced & proceeded the delay & expense of a trial. Th. C. is bound to pronounce jdg't. in his favour, for this is a matter of strict right but Costs are not. Salk. 572. 2 Bent. 196. 1st 16. 267. 1 Wool 69. 70. 572. Stra. 617.

And if a motion in arrest of jdg't. is overruled and the party moving, prays a writ of error on the ground that it was erroneously overruled & prevails in error, he recovers no costs not even those incurred in the Court below. The pff. in error never obtains costs in the court of error, but he usually does those incurred in the C. below. In this case he does not, & the reason is he ought to have taken advantage of the defect earlier. Conf 497 ^{out of} 500.

But the general rule, viz. that no costs are allowed, does not obtain where th. jdg't. is arrested for causes originally extrinsic, not appearing in the pleadings nor in the record. The reason does not apply. He is not in fault for not taking advantage of a def. etc., because it did not exist at the time. Wool 572. 47.

Now does the rule hold in cases where th. issue

Pleadings.

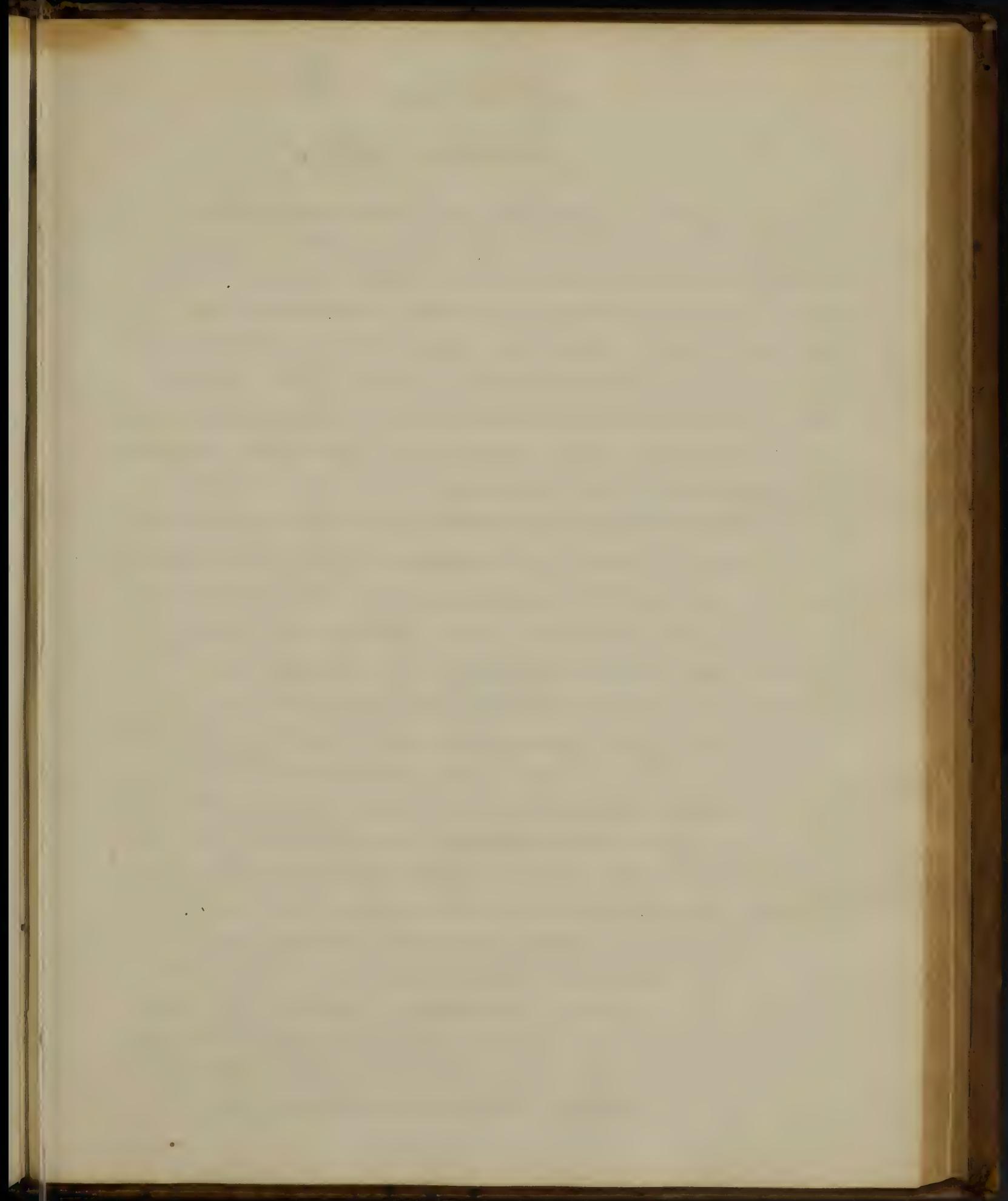
Answering Books.

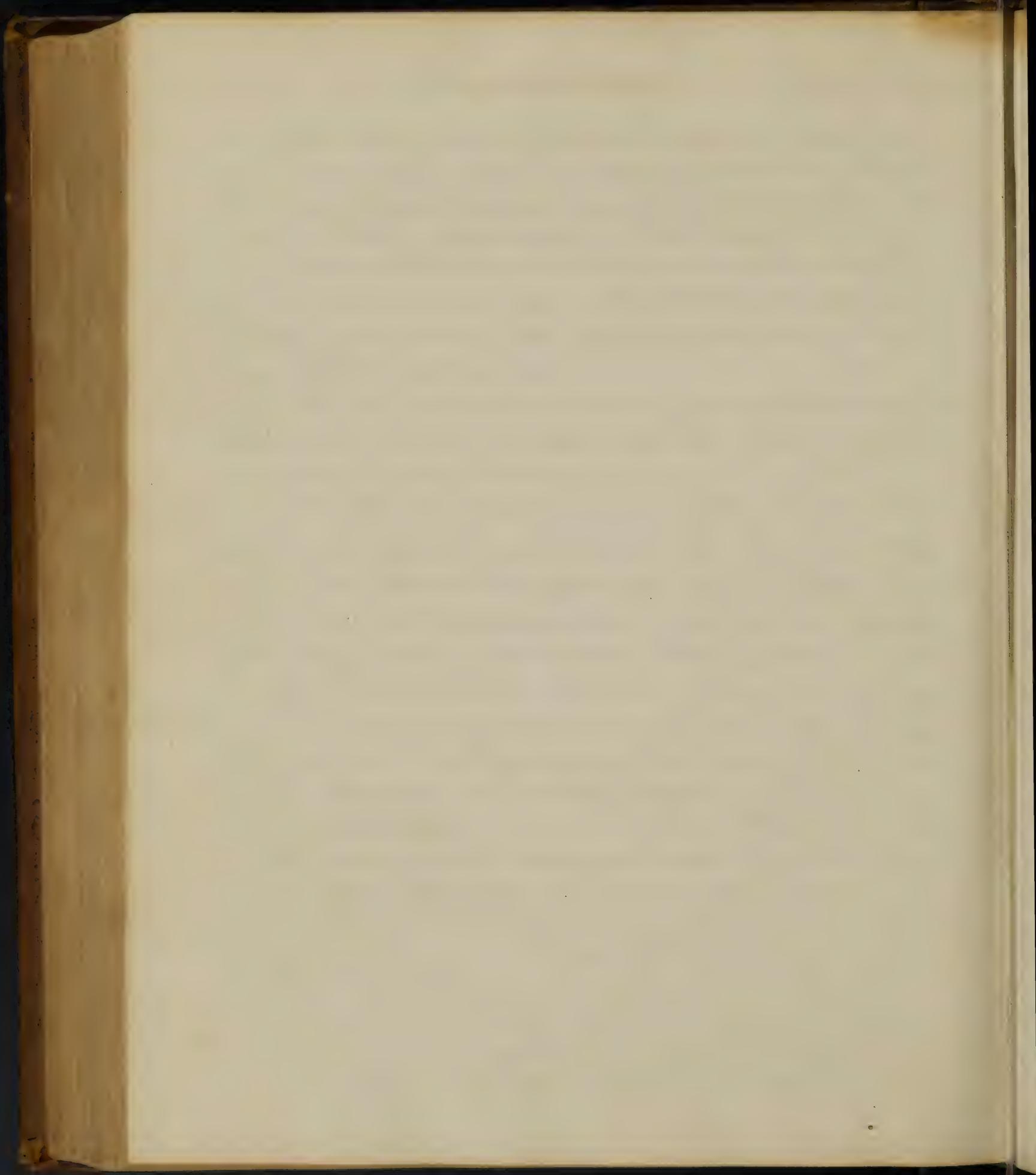
is in fact is tried by the Ct. because under an issue under an
issue in fact taken to the Ct. tried, exception may be taken
to the pleadings on a demurrer. Indeed where an
issue in fact is given to the Ct. there cannot be a motion
in arrest. Advantage should be taken of any substantia
lial defect under the issue. I think this is hardly conceivable.
The Ct. can binding the issue on fact render judgment
immediately. 2 Swift 264.

In Eng. motions on arrest of judge. are made within
on the four first days of the next term after trial. They
are made in Bank. 3136. 395.)

In Cor. motions on arrest of judge. must be made
on the verdict being accepted by the Ct. & must be deliv
ered to the Clerk or the opposite party reduced to writing
within 24 hours after acceptance. of the verdict, exclusive
of Sunday. at any rate before the end of the term, which
is there are 24 hours or not remaining. Wool 572. Kirby 235.

The form of a motion on arrest is this. The Defend.
after verdict & before judgment, rendered in the Ct., moves
the Ct. that there may be no judge rendered, for he says
the Declaration is insufficient in law wherein to found judg.
in P.P. favor. If on the part of the plkt. the same mutatis
mutandis. (Wool 572). For Form see 3136. app t. II.





Placans & pleadings.

New Trials.

An application for a New Trial. in Eng. is always by motion. This motion is for a rule upon the adm'r for
by to show cause, why a new trial should not be granted.

If a rule to show cause is granted the judgment is sus-
pended, because the motion is made before judgment
rendered. The granting of a rule to show cause is not the
granting of a new trial for after the rule is obtained, the rea-
sons for allowing a new trial are discussed in Plano.

This new trial is granted there by making the rule
absolute, or refused by discharging it. The motion then only
suspects the judgment until the rule is discharged, but
the making the rule absolute prevents the judge from
being remanded. In Eng. a new trial is always to be had
before judgment, but after judgment it cannot be had
unless by a motion for a new trial, yet it may be gran-
ted at any time before the judgment. May or Doug. 760.

In Com. a motion for new trial is usually made by
petition, & when application is made in this way, it is made
after judgment for a petition can never be made at the
same time with the writ. remanded. The reason why ap-
plications are made in Com. is that formerly new trials
were not granted by our Cts. of Justice. The application was
to be made to the Legislature alone, and that could be
done by petition. Afterwards a Stat. gave the power to the
Sup. & Inferior Courts & the same mode of application con-
tinued. Under Chas. I the same course was pursued as
formerly pursued, viz. by petition. Stat. 28.

Pleasance pleadings.

New Trials.

It seems however that new trials might have been obtained on motion as well as by petition after this Stat. There is no difficulty arising from the structure of our system of jurisprudence. I suppose therefore an application for a new trial might be obtained on motion unless because the universal usage has been otherwise. *Early 183*.

But now in consequence of a new rule of Ct. made by the Sup. Ct. application may be made for a new trial in that Ct. by motion on a certain class of cases, viz. in that class where exceptions to the verdict might have been taken by a bill of exceptions. In this rule the Sup. Ct. have determined that they will sign no bill of exceptions in pursuance of a Stat. authorizing the Sup. Ct. to make such rules of practice as they think proper. When then the objection to a verdict is one which before this rule might have been taken by a Bill of exception, it may now be taken by a motion for a new trial. *Stat. 678.*

There was formerly no time in Con. limits within which a petition for a new trial must have been filed. In 1804. a Stat. of Limitations was made. Under this Stat. no application can be made for a new trial except within 3 years after the judgment.

In Eng. the motion is to be made within the four first days of the term next succeeding the trial. The motion then there must be made before judge. & within 4 days as above. In Eng. when the application is by petition it must be made after judge. & within three years. when by motion it must be made before judge.

Pleadings.

New Trials.

because here a judgment cannot be set aside by motion.

The petition for new sets out the grounds of the application as any other petition does. The opposite party may plead to it, answer to it, or deny it. And if he answers to it & it is overruled there is to be a trial on the merits, for the Ct. will not set aside a judgment of its own merits because a demurrer to the petition has been overruled.

The bringing or pendency of this petition is no stay to the proceedings. The granting of a new trial destroys the judgment but the pendency is no supersedeas.

The application for a new trial is according to the general rule an appeal to the discretion of the Ct. The claim is not strictly just & hence a new trial will not in general be granted when justice appears to have been done by the verdict, - altho' it was done in a irregular way. Neither where the claim is a very hard & unconscientious one will a new trial be granted. I have known no case to allow the plea of usury or the Stat. of Limitations. So where the party moving for a new trial makes it appear by his own showing that he is entitled to very small damages. The Ct. in their discretion will never minister to the passions of men. 3 Bla. C. 348. 2. 115. 8 P. 338. 2 C. 16. 4. 2 440. 306. 3 Salt. 644. 3 East 406.

And as the granting of a new trial is in a great measure discretionary with the Ct. the Ct. may in granting a new trial impose terms upon the party obtaining it. Thus where a party, e.g. when an application for a new trial is made, makes it probable that the

Pleadings and Pleadings.

New Trials.

party moving for a new trial is himself in possession of facts which will destroy his cause, the Ct. will not grant a new trial unless the party will disclose on oath what he knows about the case. So the Ct. will refuse to grant new trials in many cases, unless the party moving will admit certain facts which are true.

So also they may by way of condition compel him to produce books or papers which tend to throw light on the subject. Indeed in granting a new trial may lay him under conditions which under the circumstances of the case appear just & reasonable, as they may compel him to allow old & infirm witnesses to be examined. Rule 648.

In Eng. if the ground of the application is any thing which happens at the trial, the information on which the Ct. is to act is taken from the judges report of the case, but if it did not appear at the trial, it is to be disclosed by affidavit. 31B.C.391. 18d. 235. 2 Ltr. 145.

This rule has in general no application to our practice. It has not application in any case where the trial is before the County Ct. because the trial is had before the same judges. But in Eng. the trial is first had before a single judge at nisi prius. Before our Sup Ct. this rule has an application in certain cases. Where the motion is made to the judge, before whom verdict is given there is no reason for information from the judge. But when the point is reserved for the opinion of the whole Ct. the rule applies. There must be a report, & the statement is made in writing signed by the presiding judge.

Pleads and pleadings. New Trials.

It is certainly a general rule that error is not predicable of a decision by C. in granting or refusing a new trial, for the granting is discretionary. Error is not in general predicable of a discretionary authority. But I conceive there is a supposeable class of cases where error would be predicable. Suppose a new trial is granted in a case where from its nature it is not under any circumstances grantable, error will be predicable of it. I know not that any case has occurred in Engl: But suppose a man indicted for a felony is acquitted and then on motion of the Attorney General a new trial should be had & he should be convicted, this would be error. It is always true that error is not predicable of a decision of a Ct. in refusing a new trial. Kirby 41.

In Can. a new trial is never grantable by a single magistrate, because the Stat: delegates the authority only to Superior County Courts. Stat: 28. Kirby 9.

As to the origin of the practice of granting new trials the opinions dicta in the Books are much at variance.

Blackstone traces them to the time of Edward III. Others are of opinion that they did not exist until the time of Cromwell. They certainly existed before the time of the Protectorate. The cases in the time of Edward were for mistakes of jurors. The cases in the time of Cromwell were for excessive damages, because excessive damages raised a presumption of mistake on the jurors. Since this time many other causes operate to grant a new trial. 3 Bl. & C. 587. 8. Stra. 995. 8. 14. 648. 1. Flou. 212. 17 Barb 394. 2. 3. 12. 131.

of late years, new trials have been granted after a

Pleads and pleadings.

New Trials.

trial at Bar. It was formerly supposed that after a trial at Bar there could be no new trials, because it was to be made to the same judges, who had given rise to the application for a new trial. Yet this reason did not apply in many cases, for new trials ought to be granted for mistakes of jurors, and the presence of the whole Ct. does not preclude mistakes in jurors any more than a trial at nisi prius. But that idea is now exploded. New trials are granted after a trial at Bar. Trials at bar never take place except by special order & permission of the Court, & it is discretionary with them. The reasons for granting them are, great value of the case, length of time in prosecuting it, and great difficulty attending it. 1 Bur. 395, Doug. 420. L. Ray? 1365, Atta 585. 1905.

And in general it is a max or standing rule that in all cases of sufficient importance a new trial may be granted, if it can be made to appear that injustice has been done at the former trial. True there are some cases where for reasons of policy this rule will not apply. & where the D. has been paid after he has actually paid the debt & he has lost his receipt or discharge & afterwards has found it, a new trial will not be granted. The truth is, a more general rule is that a new trial will not be granted unless injustice has been done. 3 Bl. 388. 11 Bur. 396. 6. T. R. 638.

This general rule requires that the case be of sufficient importance, for when the case is of small consequence, a new trial will not in general be granted. 4 Bur. 2093. 11 Bur. 12. 655. 395. 4 St. 16. 758.

Pleas and pleadings. New trials.

And it seems to be a general rule in Eng. that a motion for a new trial cannot be made after a motion in arrest is made, except when the cause for moving a new trial was unknown at the time of moving in arrest. The reason of this appears to me to be the other way. Suppose the motion in arrest not to prevail, why ought not a motion for a new trial to be made? that is if the party is intitled to it? And further there seems to me to be a positive reason the other way. For if a new trial actually takes place still there may be a motion in arrest of judgment after that. I think the motion in arrest of judgment ought to be tried first, because why shd. a new trial be granted when a motion in arrest of well founded would make the motion for a new trial perfectly useless. B. C. A. P. 325. 6.

It has been holden that where there are several defendants & all of them have been acquittid, or part acquittid & part convicted, no new trial could be granted as to one or any number short of the whole, because it is said the verdict must stand entire or fall so. This rule if it should stand would work great injustice. Suppose one is convicted & one is acquittid, there never could be a new trial, for of all the parties the second on one side must join, in a new trial, there can be none when one is acquittid, because he cannot petition for a new trial. The rule is clearly unexpedient, one lately it has been denied. B. C. A. P. 362, 364, 684, 12 Mod 275, Stra. 814, Bul. A. P. 236, 8 T. R. 638.

The causes for granting new trials are quite

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various. I will mention some of them. -

1. The want of legal notice to a Defendant, or an action is a good cause why he should obtain a new trial. The general rule of the Common Law is that a party must have 15 days notice in a civil action. In Com 12 & 14. Stat. if he has not had this due notice & he does not appear & judgment goes against him & a verdict affirms the damages, he may obtain a new trial. But if he appears & defends this overrules the defect of notice. He waives all exceptions to it, & cannot afterwards obtain a new trial. Salk 646. 435. 428. 8 C.P. 323.

And this is such a case where the Court cannot in its discretion refuse the granting a new trial. Suppose the Defendant has no notice at all. He thinks he makes a fair return. I suppose he would be entitled to a new trial, we conceive he has at any rate a liberty of being heard. A man has an unquestionable right to take advantage of every legal defense, and as he has once been cheated out of it, he ought to have the opportunity by a new trial.

2. A new trial may be granted for a defect or mistake of the Judge before whom the verdict is obtained. As when the Judge is so intemperate on the questions to be incapable of judging; as when he admits unproper, or excluded proper evidence; or misdirects the jury on point of law. These are mistakes for which a new trial may be granted. H. 1600 19. 12. 18. 202. 432. 783. 13. 47. 323. 5. 13. 244.

But this the admission by the Judge of improper evidence

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objected to as ground for a new trial, yet the admission of an incompetent witness of itself not objected to at the trial, is not a ground for a new trial, over the fact of the incompetency was known at the time of the trial. It may have its weight with other reasons. 12 T.R. 717.

But in 1796 our Sup. Ct. allows a new trial upon this sole ground & the evidence not objected to was written evidence. This is a much stronger case than the one recited in the Books. Parmelle v. Lamb. Sep. 6. 1796.

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3. Defects or incompetency in the jury or jurors are good causes for new trials. Defects & incompetency mean the same thing.

But if the incompetency were such as might have been ground of challenge, & the fact was known in season to take advantage of it, in that way, it will not be ground for a new trial. - Sees if not known in season to challenge. In a case in Stiles a new trial was refused, but it was because the incompetency was known at the time of trial. 5 Blac 245. 7 Mod 54. 1 Wart. 30. Stiles 129.

In such cases a bon. motion on arrest of judgment is concurrent with granting a new trial. In Eng. it is generally taken advantage of by new trial.

4. So the misconduct of the jury, as partiality, inattention etc like is ground for a new trial. So if they refuse the decision to a game of chance. A ordinary thing that prevents fairness of trial is ground for a new trial. Sta. 642, Bun. 51, 2 Litt. 140, 5 Blac 250, 288.

It is not necessary that all the jurors should have been guilty of misbehaviour, misbehaviour in one is

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sufficient. So where the Foreman has said the plts. should never have a verdict, let him produce what evidence he would. I say the misbehaviour of one is sufficient to vitiate the verdict, for unanimity is necessary in the Jury. Salk 640.

In early times perfect unanimity on the jury was not required, but for a long time past it has been necessary both in Eng. & in this Country. 3 Bl. C. 375. 6.

If they dont agree the jurors are called around with, with the bc. till they do. This has never obtained in the United States, and it is not necessary to be so in Eng. - for the danger of incurring, induces unanimity. If no unanimous then the verdict is bad & must be set aside. So if it is the verdict of eleven it is bad. It must appear at least to be that of all the jury.

But an expedient has been resorted to to evade the rigours of the rule, viz. by letting the minority come in, and acquiesce in the verdict, & it stands unless they dissent, and the law will not justify their dissent after the verdict is recorded. Comb. 14. 5 Bac 257. 291. Kirby 141. 416. 2 Swift 263.

In Eng. the jury when retiring to agree on a verdict, are locked up till they agree. and after they are locked up eating or drinking before the verdict is delivered to the judge, is misbehaviour. This is to compel them to an agreement.

Yet the verdict is not vitiated by the jury's eating or drinking. It is only misbehaviour that renders them liable to be fined. It does not affect the fairness of the verdict. 1 Dant. 125. 3 Bl. C. 375. 4 Inst. 227. Miller 111. 2 Ray 148.

But if the jury eat or drink at the expense of either

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of the parties & the verdict is in favor of that party, it will be bad & a new trial may be obtained. *1 Inst. 272* *2 W. & S. 100* *15 R. 2d* *111.*

But to relieve the jury from the hardship arising from the rule, as to abstinence arising from eating & drinking, privy verdicts have been devised. In New York they are not allowed to have wood or candles.

Privy verdicts are delivered out of Court to the judges. But these are not binding. The jury may vary from it, when they deliver their public verdict. So it is only a mode of evading the rule by complying with it formally. *2 Dow. 2d* *111.* *Dyer 217.* *3 Bl. L. 6. 377.* *5 Dac 282.* -

The delivery of privy verdicts has this effect viz. if they eat or drink after delivering a privy verdict, it does not vitiate their verdict, unless they afterwards change it in favor of the party who procures the food. *1 W. & S. 125.*

But privy verdicts are never allowed in cases of felony, or cases of life or members. Indeed never where the personal appearance of the Defendant is necessary to his conviction. Indeed I conclude where it operates in personam as whipping & the like, it can't be given, for in such cases the personal appearance of the Defendant is necessary. See us, where a mere fine is inflicted. So in such cases as these the Jury must be confined till they agree. *Long d.* *193.* *1 W. & S. 97.* *2 Kibb. 687.* *697.* -

In law privy verdicts are not necessary, for the Jury are never confined at all. This however is dangerous in cases where there is a popular verdict.

It is said in Vaughan's Reports 147. that a Jury may find a verdict on their own personal knowledge.

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This cannot be Law. If he has any knowledge on the subject he ought to make it known in open court, & if not the verdict is bad. The reason is each party has a right to cross examine & to meet any evidence by contrary testimony. 3 Bl. C. 3745. 1 Sid. 133. 5 Bac 289. McNally 238.

But in pursuance of the same principle the party have no right to re-examine any witness after returning not to ask him to what he did testify before, for he may not give a true answer. If they do thus examine, it's present of a new trial. 6 Bro. E. 189. 411. 5 Bac 288.

And in Eng. it is a rule that the Jury cannot take out any written evidence, actually exhibited on the C. without the consent of the parties or judges. Holt says if the writing furnished evidence both sides the verdict is good, otherwise not good. This leaves the rule loose. The evidence may be strong on one side & light on the other. And I think the party ought to have a trial right to deliver to the Jury the evidence which was exhibited on the C. for they understand it better by perusing it. In law the written evidence goes to the Jury as in abstr. of course. 1 Inst. 227. 620. 4 H. 3745. 5 Bac 289. ~~McNally 238.~~

But if the Jury takes with them any written evidence not exhibited at the trial, the verdict is bad here & in Eng. and a new trial must be granted. They have no right to found a verdict on evidence not exhibited on the C. 1 Sid. 235.

But the famous misbutious nobiles the verdict, yet they have no right to tell the fact. Namely, it was otherwise. I do not see the reason of this.

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for to impeach his own witness does not prove perjury, but only proves a breach of a promissory oath; an oath of fact. In other cases a man may testify against himself if he wills but in this case he is not allowed. *16 U. L. Reg. 189. 5 Bac. 288.*

In all these cases motions in arrest of judgment are concurrent with new trials.

5. It may be a ground, tho' not always, of a new trial, for the jury to find a general verdict, when directed by the Ct. to find a special one. The reason of requiring a special verdict is to let the Ct. have the naked facts, that they may apply the Law.

Yet this is not a misdirection, & therefore the jury are not fineable, for they may find a general verdict of they please. It is not illegal. But if they find the Law as the Ct. think they ought to, a new trial will not be granted, tho' a general verdict was found, when they were ordered to find a special one.

So it seems 'tis the finding verdict contrary to Law, that is the ground of a new trial & not the finding a general when directed to find a special verdict. In one case a defendant was refused, till that was after a trial at bar. *1 Plow. 6. 213. 5 Bac. 281. 7. 11 Mo. 37.*

6. A verdict being contrary to evidence is ground for a new trial in Eng. & in Law. Swift says otherwise. Indeed there formerly was a doubt about it. But it is now settled that it is the law in Law.

Yet the Ct. being pretty strongly inclined in favor of the unscrupulous sides will not be a reason for a new trial. Indeed the rule used to be, that it must be so that no

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evidence be adduced, or more than amounts to any thing, in favor of the party, upon whom the verdict is found. But now if the verdict is clearly agt. the weight of evidence, a new trial will be granted.

So when the scales of evidence are nearly equal, none will be granted. But where there is great inequality, a new trial will be granted tho' there be some little evidence on the other side.

There has been much controversy on this point; for it is said the Jury are the proper judges of the evidence and therefore it is said the Ct. affirms the power of a jury by allowing a N.Trial. here. But I think it is not true, for they do not affirm the power of trying the issue themselves, tho' they only refer it to another jury to try the question over again. Conf. 37. Bul. A.M. 326. 7. 2 Stra 1105. 1162. 2 Bl. 6. 342.

7. Again. If the Jury have given a verdict on a misconception in point of Law, or generally agt. Law a N.Trial may be obtained. So it often happens where the Jury find facts, they make a wrong conclusion from them. So if an action against endorser of a prom. Notes no proof of notice having been given to defendant, friends may testify to it, provided they find for plff. Saltk 646. Stra 445. 425. 2 Bl. 1078. Com. 402. 4 T. R. 470. C. Ray 147.

In some cases applications of this kind have been unsuccessful, but it was because the Ct. were not satisfied that this was the case.

But a N.Trial will not be granted of course where the ground of the application is very hard. It must be shown that

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substantial justice has been done, none will be granted: so where the plff. is entitled only to nominal damages, but verdict is for deficit. Then a new trial is granted to obtain the ends of justice only. 3 Bac 246. 3. 4 Blac 2093. 4 St. Tr. 758. 20 H. 5.

8. In certain cases, non-alienation of damages is a cause for a new trial. But this is only on contracts, where a clear rule of damages is given. No cases where the action sounds in tort & damages are presumptive, in which a new trial is granted.

So if in an action on torts, the jury should make no allowance for interest a new trial would be granted.

But in Malicious Prosecution, presumption of no tort. Trial is granted. Yet I should think in some hard cases, new trials might be granted, tho' the action sounded in tort. But no case of that kind. Stra 940. B. & P. 327. 4 St. Tr. 655.

Indeed in one case the plff. said there was no reason why a new trial should not be granted as well there as in other cases. 2 Barns 354. Stra. 425. 1259.

9. Capsomeness of damages is ground for a new trial both in contracts & torts. If so why not for non-alienation of damages. Indeed formerly it was thought no new trial could be had for capsomeness of damages, but that idea has been long exploded. 1st. H. P. 237. Stiles 482. 1 Blac 609. 3 Blac 1845. 1st. Stip. 277. 8 St. Tr. 287. 4 St. Tr. 657. 7 St. Tr. 329.

When new trials were first granted on this ground, it was thought to be on the ground of partiality, but now this is not sufficient in many cases to be any partiality at all. New trials are granted. On even a new trial that has been granted under these circumstances. Adams 10.

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et non tract.

In debt, & told the Plaintiff that damages were paid only to the amount of 500\$. to Defend. he is' go by default, & pleads look out 200\$ of damages. This is excessive & besides it was as misconduct.

In some cases of very great damages no A. trial is granted. So in actions for Crim. Con. The opinion has been that in such cases a new trial could not be obtained etc. But why not as well as in case of Bullying. No better than is more of a rule of damages furnished in the case of Bullying than in cases of Crim. Con. as loss of time, and Buller in one case says it might be granted even in this case. Mr. Young holds the same opinion. In case of Bullying the damages by way of hurt money can never be excessive. It is analogous to Crim. Con. (See 509. 40. 16. 65. 507. 16. 25.)

But in cases of assault & battery a A. trial may be granted. In case of an actions upon good service, a missile for injury to his daughter, the damages can never be excessive. Hence the same observations at supra might be applied. I see no reason why a A. trial may not be granted in both cases. 18. 16. 25. 30. 16. 25. 20. 16. 16. 3. 16. 16. 16. 16.

New trials may be granted in cases of Slander. The cases of Slander have been, generally where there was misconduct on the Jury. See Stiles 462. We generally agreed to be here stated. Bulk 644. 113. 394. 10. 16. 277.

Dr. Compton has strongly contended in one or two cases that Judges ought not to grant a A. trial in case of trials, unless the damages upon the first trial appear most outrageously excessive. He says it is substituting L. C. for the Jury. But this observation would apply

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in case of a verdict, contrary to evidence. But all allow that in such a case H. T. Wells may be granted. Candler has frequently been cho't more of a Statesman than a Judge in his observations. He would always oppose S. C. Moore & John. The rule is now well settled w^t his opinion. H. T. Wells 205. 244.

off by a mistake in the jury in point of computation, the plff. recovers too much, a Ct. Trial will be granted. So if on Bono they calculate interest wrong. But plff. may prevent a Ct. Trial by releasing this w/c/cf. 2d R. 11323. Camp. 1571. 2 Will. 2d 21. 1% east 367. J. S. Collier A.M.A.

Under our law the mistakes of counsel in pleading a wrong ple. is a ground for a c.t. trial. This is what is called in our Stat. mispleading. I do not find that a trial has been granted for this precise cause in Eng. tho' Justice Buller says in a certain case where the effect of the plead was misconceived by the counsel the C. Ch. it ought to be a cause of a c.t. trial. It ought to be more general in Con. than in Eng. because here a party can plead but one ple. but in Eng. under the Stat. of 1819 a party may plead many ple. Stat. 28. 2 & 11. 131. 10 Mod. 302. 3.

And it is clear that the neglect of the cause
is now a ground for a N. Trial. The money of the party is
at the Treasury. Box 8. Mod 222. 122. Sack 645.

I doubt whether in Con. a St. Vacate would be granted for suspending where the offence is an unconscious one as M'ney & Stat. of Limitations. In Eng. in a very modern case the Lt. refused to postpone a trial, to await the death of M'ney as an unconscious one, to wit, M'ney's. 1655 & Rel. 52.

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When an application is made on this ground or con-
the petition must state the plea in defense which he
is to make, that the Co. may see whether it is sufficient,
and he must also state that he is able to perform it.
1 Blac. 572. 2 Steph. 271.

That a material witness was absent at the first
trial, thro' inevitable accident or misfortune is a good
cause for a N.Trial. As if he was prevented from attend-
ing by a sudden illness, or by any thing which is clear-
ly a reasonable & sufficient excuse for not attending.
5 Bac. 252. 11 Mod. 1. 6 &c 22.

But a N.Trial will not be granted for this cause
unless in the petition the witness will make affidavit
of what he knows that the Co. may see whether it is ma-
terial, & likely to affect the issue. Salk. 645.

In Con. the petition states the testimony which
the witness will give & before the petition is granted the
witness must state what he knows, either by deposition
or viva voce as in Common Caus.

Again. The absence of a material witness when
occurred by the covin, fraud or practice of the opposite
party is cause for a N.Trial. Not to grant a N.Trial
in this case would be to allow a party to take advantage
of his own iniquity. 5 Bac. 252. 11 Mod. 141.

But the wilful absence of a witness, or absence
thro' his own negligence is no ground for a New Trial.
5 Bac. 251. Salk. 653.

And a new trial is never granted for the absence
of a witness whose testimony the party might have had

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by using due diligence. None he suffers in consequence
of his own neglect. Salk 647. Stra 691. 16 Wils 98. 5 Bac 252.

Surprise occasioned by the introduction of unexpected evidence on one side is no ground for a new trial. This is the English rule. Now is a mistake made by a material witness a ground for a N. Trial. The reason is, Cts. have thought it dangerous to grant a N. Trial after one party had understood all the evidence on the other side, to have an opportunity to mould or shape the evidence according to exigency of the case. 2 Atk 319. Stra 391.

Cts. have in respect insisted on giving a N. Trial where the material witness has made a mistake and it could be proved.

Another ground for a N. Trial, in law, is the discovery of new evidence which is material. It is so made out by Stat 78. and it is said in this case that it is a ground for a N. Trial in Eng. but the course of authority is the other way. The Cts. in Eng. proceed upon the ground that it is of dangerous consequence, as in the case above specified. 12 Mod 584. 5 Bac 282. 7 T. B. 269.

But a N. Trial will not be granted in such a case unless the Ct. are satisfied that the evidence is material and that it is surely discovered, for if by common diligence the party could have known & obtained the evidence before, it is no ground for a N. Trial.

A petition for a N. Trial on this ground must state what the evidence is, i.e. the substance of what was before given & also must name the witnesses that are all the witnesses, if there would do just testify. Rely 283. Wool 89. 2 Swift 270.

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If the cause has been lost, by the testimony of a witness legally infamous, & that was unknown to the party agt. whom it was used as evidence, a st. trial is granted on English principles and on our own. This is settled in the English Books. There is a case in Salk. where the Co. refused, but it was upon the ground of ignorance in the party. Cts. of Chaney usually allowed st. trials in a loc. of Law under their direction. This is not now necessary. The common practice is now out of use. The reason is he has lost, a verdict by illegal evidence, which he did not know was illegal at the time. 13 B&C 394. 5. Salk 653. 12 Mod 584. Brachy. 194.

This conduct of parties is in certain cases a ground for a st. trial. If one party treats the Jury, or if he solicits a person to find for him, or makes any representation to the Jury in his own favor. These are all causes.

So also if the attorney of the successful party is guilty of improper conduct towards the Jury. As in generally kinds of bribery, i.e. any attempt unduly to influence the Jury is good cause for a new trial. 11 Mod 141. 2 Dant 173. 1 Bent. 125. 5 Bac. 292. 4 Bl&C 140.

It was formerly held in that st. trials were not grantable in actions of ejectment, because a judgment in an action of ejectment is not conclusive between the parties, & of course a new action may be brought. The reason is the parties are all fictitious & are the proceedings. Salk 648.

The rule now is that st. trials may be granted in ejectment as well as in any other cases if the verdict is for Plaintiff. When it is for Defendant it will not be granted unless there is something very particular or extraordinary in the case.

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The reason of the distinction is if the D^efend. prevails, the parties are in status quo, but where the plff. prevails they do not remain in status quo, because the D^efend. by reason of the judgment is turned out of possession. Salk. 648. 650. 4 Recur. 2224.
Stra 1106. 5 Bac 253. 4.

It has formerly been said that after there have been two several verdicts, between the same parties, and the determination the same way, there ought not to be a new Trial. This rule does not now exist, for there may be after three. A very notable case in Pennsylvania. 6 Mod. 22. Salk. 649. 1 Sid. 31 or 31. 3 Blac. C. 387. 4 Recur. 2108.

And it is a general rule that new trials are not grantable against a D^efend. in Criminal cases, tho' they are granted in his favor many times. This is a rule founded upon the benign principles of the Crim. L. Law. Coupl. 37. Root. 86. 7.

According to Eng. law a New Trial is not granted in all criminal cases in favor of D^efend. In all criminal cases where the offence is higher than a misdemeanor, no new trial is grantable on either side. 6 T. R. 638.

But where the offence is not higher than a misdemeanor, a Ct. may grant a New Trial in favor of a D^efend. as for Libels, break of the Peace, Perjury &c. 6 T. R. 638. Stra. 968. 1012. Ed. Ray. 63. Doug. 760. 5 Recur. 2669. 1 East. 159.

It is indeed a strict rule of C. Law that no party shall twice be put in jeopardy of his life. In Civ. New trials are granted in favor of D^efend as well as in cases of felonies as in other cases, and this is the rule under the Laws of the United States. Root. 86. 7.

But where the offence does not exceed a misdemeanor

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it seems to be the rule that no new trial can be granted agt. Difend. tho' it may be granted for him. Stra 899. 12 W. 124. L. Ray. 63. 2 T. R. 484.

To this rule there are two exceptions. The first is when the Difend. has been acquitt'd in consequence of a fraud practised by himself. & so if he has suborned witness tampered with the Jury &c. Show 336. 12 Mod. 9. Stra 1238. dalk 646. 12d Ray 63. (See 124)

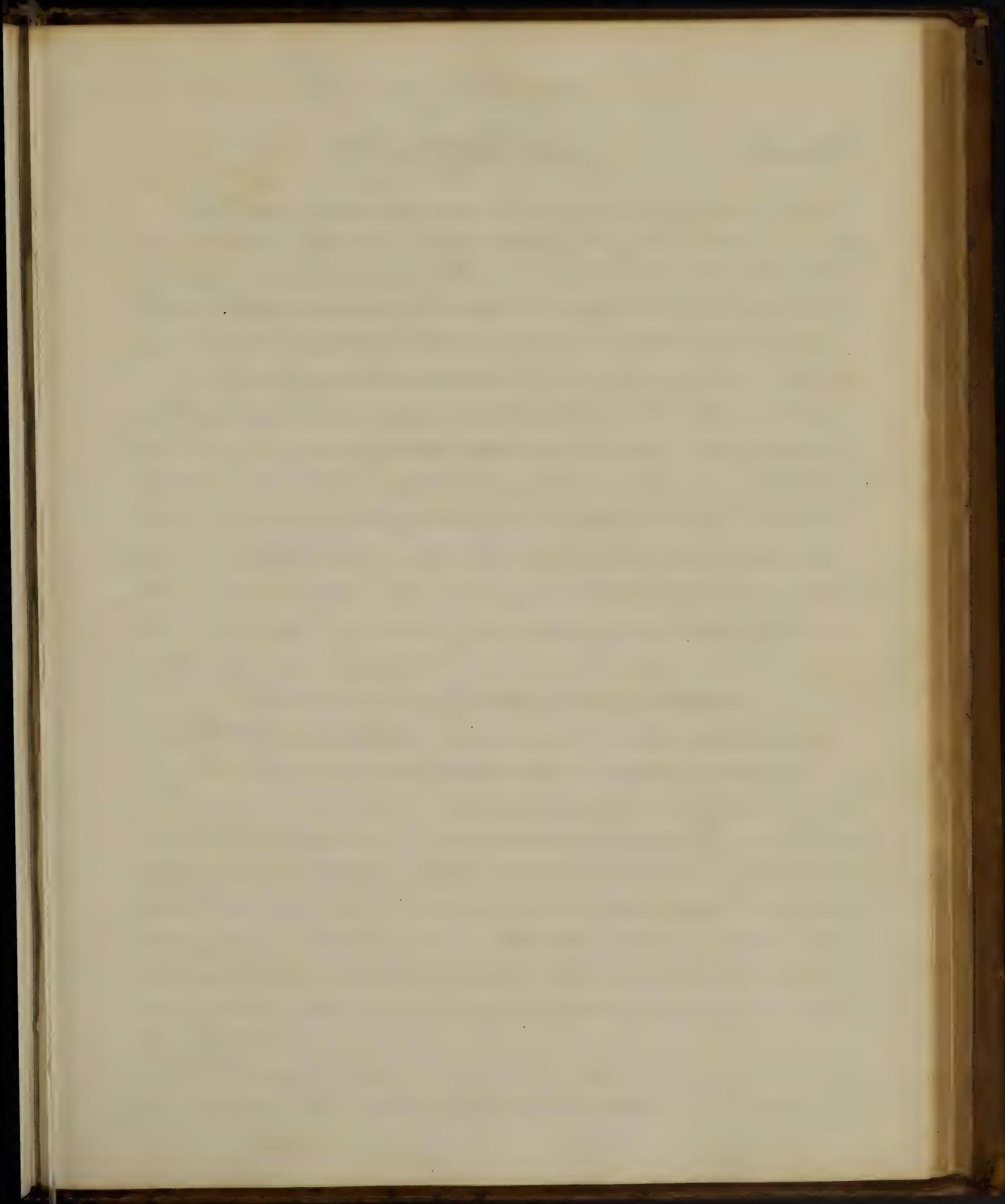
Second exception is, where the acquittal has been obtained by the misdirection of the Judge or point of law a N. trial will be granted agt. Difend. because he has been substantially convicted of the fact. 4 T. R. 753. 53 T. R. 20.

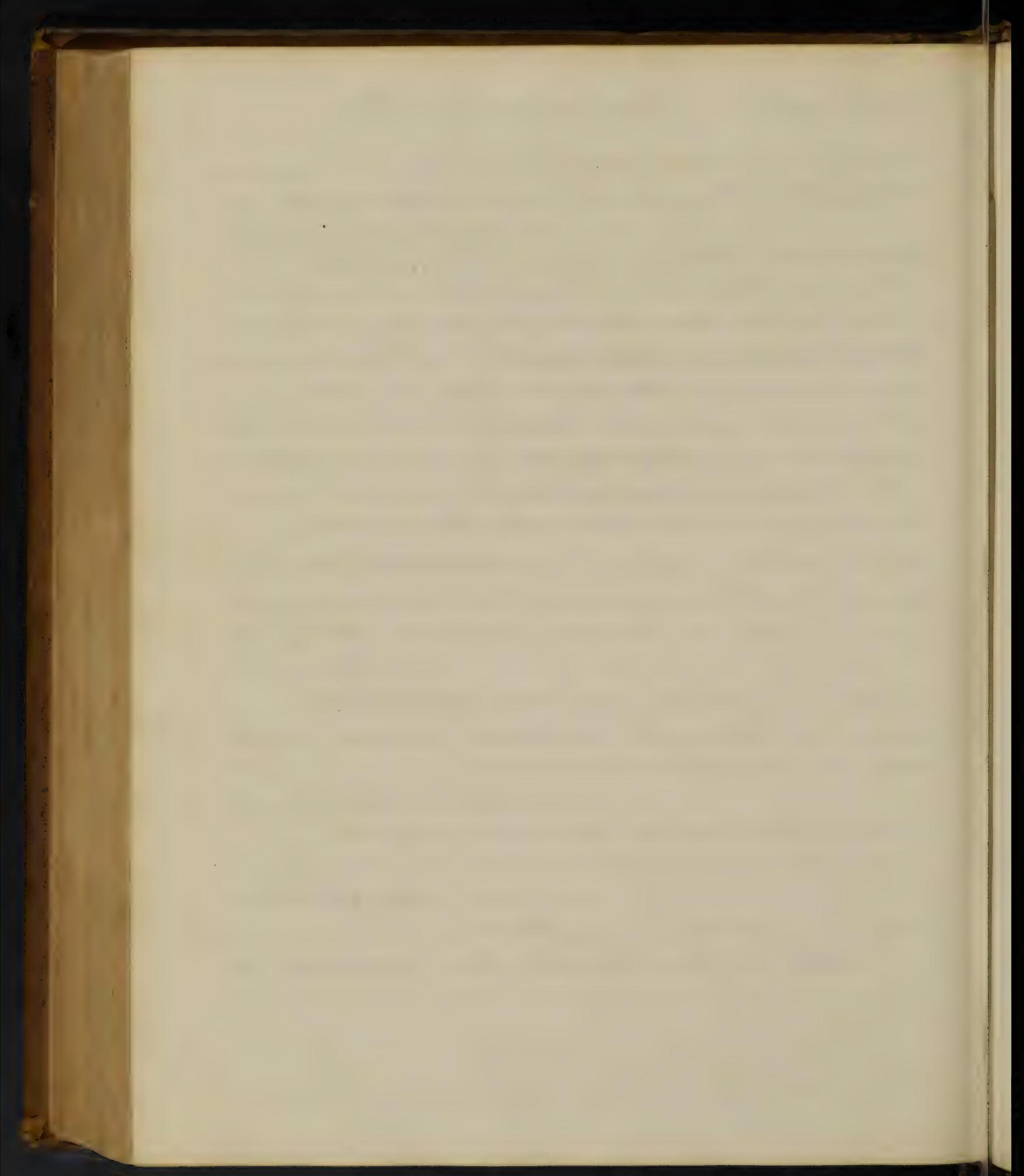
And in a Qui tam information a N. Trial can't be granted for the civil part, unless in granting it a new trial is granted for the Criminal Part. Granting a new trial in Eng. & Con. vacates the judge tho' conditions may be imposed. Root 86. 7.

As to costs ... when upon granting a N. trial in Eng. the costs are to abide the event of the suit. If the party succeeds a second time, he shall have costs on both trials. 8 T. R. 619. 3 D. 503.

But if the other party succeeds in the second trial, he shall have costs on the second trial only. - 2 H. 13 C. 639. 641.

In Con. it is the general tho' not universal rule, that the whole costs abide the event of the suit.





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Writs of Error.

Lecture XX.

The principles found in the English Books on Writs of Error must be the same every where, but the mode of carrying them into execution is different in different countries and different States. ours differs materially from the English mode but the principles as to reversals of judgments are the same.

A writ of Error is said to be a commission directed to the judges of a Superior Ct. to examine the record of an inferior Ct. and if error appears to reverse the judgment, it may appear to affirm it. A judgment on a writ of error cannot pass as a judgment on a common suit. It cannot pass on a default, for the Ct. must learn themselves from the record whether it is erroneous. If the被告 fails to appear the Ct. cannot reverse the judgment of course & pass it as in the case of a default.

There are two kinds of Writs of Error

1. For Error in Law 2. For Error in fact

We shall be most conversant about the first for it is the most common and most important. By the way however, when they speak of an error in fact, they do not speak of any error as to the facts produced & found by the trier, as the fact which the jury find that the Difend. accepted promissory, but they mean that there is some fact existing before the record, which makes the record erroneous, for no writ of error lies for a wrong judgment unless it appears on the record.

The error in Law complained of always appears on the record. The case is there stated upon the record, and

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The point determined must there appear as much as ^{the} a ~~whole~~ case or a demurrer to a declaration. And in all cases it must appear on the record & no inquiry can be made out of it. By this may there be many things which don't appear on the record as a demurrer to a Declaration, wh. may be tried upon the record by a certain mode of proving to be mentioned hereafter. Every wrong opinion of the Col. may be tried upon it. -

This writ of error, (or error in law) does not lie for any matter ~~about~~ ⁱⁿ the record. No inquiry can be made into any matter which is extrinsic of the record. So you see a writ of error may always be tried upon a judgment upon a demurrer. I am now considering the subject as this there was no appellate jurisdiction at all, and there are many cases where this is more. -

A question of law may arise that does not appear on the record, and yet it may be placed upon it, if it is a writ of error vice vice. As where there is a motion in arrest for the insufficiency of the Declaration. This being the foundation for a writ of error. The Col. admits or rejects ^{any} other. The said Col. offers himself as a witness. To objects to him as the ground of interest, but the Col. admits him. Yet still this he was an interested witness and wished the opinion of a Supreme Col. This is put upon the record by a bill of exceptions to the opinion of the Col. stating that he was offered the ground of the objection to him, & the fact of his admission by the Col. and in this may may any other opinion of the Col. as a witness in giving a change to the law be placed upon the record by a bill of exceptions. and the judge is bound to certify

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by his office oath that this was the case, if it is declaration
ly, & if it is not, he must state it himself.

This writ of error lies for any interlocutory judgment
of the Ct. tho' you will observe that it can never be brought
until final judgment is rendered. As where the Ct. overrules a
plea in abatement, & on the defendant cannot bring a writ
of error until after a trial on the merits, so there may
be no writ for it - but if on the trial he fails, he may
then bring his writ of error upon the opinion of the court
in rendering judgment agt. his plea in abatement. Rule.
L50. Cro. C. 6. 35. 11. 60. 34..

So in an action of account defendant pleads in bar.
defl. &c. demurs. The Ct. renders judgment quod computet. A
writ of error now lies. The question goes to creditors, and
they award that the defendant is in arrear. Now the defendant may
bring a writ of error on the judgment of the Ct. vs his plea in bar..

So in cases of partition no writ of error lies until the
writ of partition issues & a return is made and judgment
rendered by the Ct. upon it, for the partition may be accord-
ing to his wishes.

It is no objection to a defendant bringing a writ of error that
he made no defense. Suppose a defendant where there is a fault
in the declaration. As where an action of slander is brought
for calling the plaintiff a villain. The defendant suffers a default.
He may bring a writ of error to reverse the judgment, for
the Declaration is altogether insufficient.

So if the cause had proceeded to trial, & he had made a de-
fense but had taken no exceptions to the defect in the dec-
laration, he might bring a writ of error afterwards, if the

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declaration was substantially defective. I am not now speaking of defects cured by verdict, for then no writ of error lies. I am speaking of declarations which contain substantial defects, so that they would go out on a general demurrer or on a motion in arrest.

And this rule applies to other parts of the pleadings as well as to the declaration, for you see the traverse must be immaterial & no case tried. As where D'Fevre pleads many, but does not state any in his plea, he only states a ~~non~~ number of things, which, merely amount to extortion. The plf. instead of "denying" to traverse them & they are found in favor of D'Fevre. Now the plf. may reverse that judgment & this all appears upon the record.

There is a rule which is to be noticed, that what is pleadable in abatement & not pleaded is not subject of error, but if pleaded it is subject of error.

But there is this exception to it, for if the writ is utterly void so that no judgment can be rendered upon it in favor of the plf. the defect if not taken advantage of by plf. in abatement is a subject of error. & if a female couple bring an action in her own name & states in her declaration that she is married, no plea in abatement is put in & judgment is rendered in her favor, a writ of error will lie. So if the Co. had no jurisdiction of the subject matter of dispute, a writ of error lies.

Another rule is to be observed. No person can bring a writ of error on a judgment except a party or privy to the record, & the party must be one, who has been injured by the judgment; as if the controversy is about land,

Pleas and Pleadings.

Merits of Error.

and the owner dies before a writ of error is brought, who can bring it? The person to whom the land descends after the owner's death... by the heir of those has been no will. It must be tried by the representatives of the deceased, who is injured by it. If the controversy is about personal property, it must be tried by the Exec. or addⁿ. If there is a devise of the land, he must bring the writ of error. 1 H. C. 747.

The principle extends further than mere representation. A sells to a farm of his & conveys the title to said D. in quietus to recover it. They go into a course of proceeding & the Ct. adjudges that C. shall have the land. D. is injured by the judgment & the verdict in the action. But it is such a privy that he may bring a writ of error and recover this judgment. 1 H. C. 748.

This principle may be explained further. Suppose A sues D. to recover 40 acres of land and 50 £ damages. Suppose it goes in favor of B. now A. dies. Who can bring a writ of error? Very clearly A's heir. But he will not do it. Then D. may bring it who is the Exec. for he is injured, for the suit is for personal as well as real property. And if C. the heir should settle with B. and give up all more in that judgment, still D. may bring a writ of error, for the damages are not abated. 1 H. C. 558.

This principle goes still farther. If there are more defendants than one, the general rule is that all must join on the writ of error. What suppose one is acquitted. Should the other defendant recover it? There arises a difficulty. Let's say D. C. and D. and D. is acquittⁿ. D & C. wish to reverse the judgⁿ. D. objects to it, for he says you are bringing me into difficulties.

again - for the case may be so revolting that there may be another trial. The rule appears to be established that they have a right to reverse the judgment. I find no case in the books that our Courts have permitted after reversal the case to go on only against the two. 121. 210.

There has been a question much litigated in the Courts which yet remains doubtful, viz. whether bail can bring a writ of error to reverse a judge rendered agt. the principles. If there has been no case, I should suppose he could, for he is injured by the same judge if it was erroneous, for there could be no judgment agt. him as bail. There are however a variety of authorities agt. this which say he cannot reverse it. But he is as much a party to the record as the wounded mentioned before. I know of no modern case which settles the point. The principle always is that he is admitted, not that he is actually a party by name. See 6. 481. 400. 47.

The proceedings in a reversal are different in different Courts. I will point out the English mode. As common on cases, when a case is reversed from an inferior to a Superior Ct., the record itself is carried up and not a transcript of it. As in a case carried from Co. B. to B. R. and from thence it follows that judgment is rendered in B. R. on the record as it ought to have been in Co. B. and they issue execution upon it.

In Parliament it is not so. The record is not carried up (except as is allowed for) only a transcript of the judgment is affixed thereto. Below it is written in the judgment what the record is. If it is reversed

Pleas and pleadings.

(Writs of error)

the Ct. below issue no writs, but, under judgment of the Ct., or a way, for Parliament may render the judge. (See § 34.)

When the record is carried up a scire facias (as they call it) issues "ad audiendum erroris." This is not usual, for the Ct. of Error generally appears without notice. (See art. 4.)

In this country nothing more is done than to take out a writ 12 days before hand stating all the errors, and it is read to Defendant in error and he comes before the Court as any other case does. This mode is pretty expensive, it is said of the National Court.

The Court of Exchequer in England is a Ct. instituted only to try errors. Writs of error on suits originally commenced in P.R. are brought to this Court, and tried by the Barons of the Exchequer & Justices of C. R.

2. Errors in fact. I will now take notice of errors in fact.

This error in fact is something out of the record, as Coveture & Infancy, and so in any other case where the Court cannot properly render judgment as they did by reason of some fact existing. As where Plaintiff leaves out of the State, the Ct. are bound to continue the case one term. Suppose then Plaintiff should take judgment & exit the first term. A writ of error lies on this judge. And the same is true if the Defendant is a citizen of this State but is absent from the State at the time of serving the writ...

But suppose the fact is denied that Plaintiff is another State, & Plaintiff avers that the defendant was in him.

Precisions & pleadings.

Writs of Error.

in law at the time the suit was brought. How is the fact to be tried? Just like any other question of fact, by a jury, and the fact must be tried in issue like any other fact. The general issue to a writ of error is "in causa est veritas." This you must not plead when you deny the issue in fact, you must do it directly, as any other denial of a fact.

This writ of error may be brought before the same court that rendered the judgment. The judgment is not impeached by it, for the writ of error is grounded upon an error in fact not known to the C. This is a writ of error ex amercement, and the same court may correct the mistake.

I will now mention a general principle which is very important. It is this. When judgment is recovered the C. is to render such a judgment as will restore the party to all he has lost. This is all that is asked for in a writ of error which on this subject puts on the appearance of a bill in Chancery. Suppose an writ of error is taken from C. B. to W. H. in a brought an action ag^t D. The defendant was declared delinquent and judgment rendered that A recover 100 £ of D. with costs. D. brings a writ of error and prays alms. What must D. recover? The principle is, he recovers all that has lost, save what has D. lost? This must be ascertained & the recoveries the amount upon the recovery, as he had paid the money upon the execution, this must be deducted, with interest from the time he paid it.

Pleas and pleadings.

Writs of Error;

When a judgment is reversed for ^{§ 5} Rule XXXI.
pl. of error, tho' it was p^l in the original action, the
general rule is, that the Co. above ^{reverses} the same judg.
that the Court below ought to have done. This is to be ob-
served however, that it is not always possible for the Co.
to do this, for it may be out of their power to summon
a jury. In such a case the Co. below must reverse the
judgment, which they ought to have rendered at first.
This I believe is the case with all the Supreme Court
of Errors in the United States. They can summon no jury &
can aff^p no damages. 2 Sand 256. 1 Salk 401. 403. 413. 262.
Court 80. 206. 207. 774. 805. 620. 6. 442.

This is the character also of the Court of Appeals
year. Suppose in C.R. the defendant pleads an abatement.
The Trial. is abated. A writ of error is taken to the S.W.C.
They overrule the plea & reverse the judgment by rend-
ing a judgment of respondeas ouster, which the Court be-
low ought to have done. But suppose C.R. affirms the
judgment of C.W. and a writ of error is taken the Appeals
Chamber, & they reverse the judgment. Now how is
the case to be tried? It must go back to the Co. from whence
it was brought. This Court of Appeals can reverse
only our Sup. Co. of Errors. 1 Salk 483. 4. Mo. 125.

I apprehend we have a method which is uniform
in the United States, not different in principle, but in the
mode of carrying it into execution. It is this - Suppose the
reversal is for diff^t. They cite you on the Books that the
only judgment rendered is *quod non resisteat*. Let it be noted
this they say is all he wants. But yet you see if the plff^t

Please and pleadings.

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has recovered recovered money money out of the defendant, he deft. would not be in able give by a new judgment o' reversal. He to be done is so far restored that he may bring a sumptuit for money had received, but this is concerning a man to bring a suit to get his money.

We find here they are you a writ of restitution to issue directing the party to restore to him the money. This is an Exr: in fact, yet it is not a part of the judgment, for that is only your reversal. What is to be done if the party refuse to pay? I know not, I suppose however the process is effective...

In this country, the judgment is not only a reversal, but a restoration of the money, which is a part of the judgment and exr: issues. If no money has been paid the judgment of reversal is the same as in Eng. except that England has her writs...

However it seems according to the English practice of readings, if the money has not been paid over, but is in the hands of the plaintiff, no writ of restitution issues but an order goes to theiff. to pay it back. 1 Gall 588.

So if land was in controversy & the party has entered by force of a judgment which was reversed, the judgment would be quashed and a writ of restitution with an Exr: would immediately issue.

If the man who has thus gotten possession of the land sells it to a third person, no writ of restitution issues against the third person, but a scire facias issues to call him in. He has no title to the land. The great principle of reversal is, to put the party in the same

Pleads and pleadings. Writs of Error.

situation he would have been, had no judgment been rendered, which is to be done by the Supreme Ct. of Errors. Show
261 Bro 6. 442. Barth. 253.

I am now to speak of judgments affirmed. Suppose a judgment is affirmed by Supr. Ct. of Errors, what is to be done? Do they issue an Exet? No - the judgment is now declared to be perfectly good and so that Ct. you must go for your Creditor. What then is rendered a Supr. Ct. of Errors? Why that the judgment is affirmed. But here the Defendant in error says, I am injured, I have lost the interest of my money one year, well how is he to get it? he must be restored to all that he has lost, and the Court of Errors will issue an Exet for it. But there is another way. They may render judgment for damages & costs before Exet for them. & not for costs on the writ of error, for ex. Com. by virtue of a Stat. he cannot recover them. 2 Paro 225, 4 Mod 127.

Next - As to the question whether a writ of error is a supersedeas to an Exet. A writ of error alth. L. Law is a supersedeas to the Exet after the writ of error has been allowed & delivered to the Clerk of Errors. This is given to him, that an opportunity may be given to every one to find out whether an Exet can be issued upon their judgments and 8 days are allowed. We do the same here in another way, for where the writ of error is signed by the Judge, it is a supersedeas of the Exet, if the Exet is in the hands of an officer, & he has had no notice, he may lay it without being guilty of a contempt. If he knows it, he would be guilty of a contempt.

Pleas and pleadings.

Writs of Error.

There is blood at C. Law. - They have now furnished a partial remedy to evils originating from the principle that a writ of error is a supersedeas from the time it issues. - The evils were many. The property of the party may all be gone before the writ of error is determined & the Plaintiff may succeed he can get nothing by it. To prevent this evil they made a Statute, declaring that in certain cases a writ of error shall not be a supersedeas unless a bond was given to respond the judgment. In Com. this bond is extended to all cases. Now this bond will prevent any damage you the Court are bound to take a good bondsmen who may be sued & a recovery had of all damages, and collected out of him if the principal be unable to pay. The writ of error then must be a bonded one. In Eng. I observed, it was restricted to certain cases. I wonder they did not make it universal. Barnes 375. 200. 205. 3 Litt. 112. 1 Gall. 321.

There is some uncertainty as it respects what follows. The authorities are contradictory. One thing seems certain. If the body of a man is arrested he is not actually lodged in jail, but as on the way thro' of the writ of error comes, he is to be discharged. This will always do where a bond is given. But I don't see whether it applies in Eng. to those cases where bonds are not required, for it would be depriving a man of his security.

They tell you this is a proposition which is supported & contradicted by authorities, that if goods are taken by a Sheriff & he has once begun to execute, what he has once done stands good. This I do not see

Pleas and proceedings.

Writs of Error.

to be necessary when bond is required. True when there is none.
I should think he ought to hold it. Barnes v. 2. 2 H. 8. 491.

Courts of Error in England. The C. Pleas is a Court of Error to reverse judgments of lots. below them. I have seen no case where a writ of error has been taken from this court reversing or affirming a judgment rendered by an inferior lot. I am inclined therefore to think it is final, although a writ of error may be obtained by being taken from one of the inferior lots to B.R. A writ of error can be taken from C.B. to B.R. and from thence it can be carried to the Exchequer Chamber and from thence to Parliament. A judge in B.R. upon principles of C. Law could always be carried directly to Parliament, or to the Exchequer Chamber and from thence to Parliament. A Stat. has given an election to go to either, but if they go to Exchequer Chamber it is final. 1 Sand 346. 6 Inst 380.

If the Exchequer Chamber affirms a judge the lot below must issue ex*cuius*. If they reverse for Plaintiff, a judge given in B.R. it puts an end to the suit. If for Plaintiff the case must go back. As for refusing a witness who must now be admitted. If it was a defendant or any interlocutory judge, it must go back.

Now for our mode of writs of error onto us? Our Sup. Ct. is a Ct. of errors for all inferior Courts. We record every one here to what he has lost. but in a different way. If in Sup. Ct. judge is reversed in favor of party below they often have to enter the case in Ct. as though it came there by appeal. The only judgment is, that the judgment ^{below} be reversed, and to enter his cause if he please.

Cases and pleadings.

Matters of Error.

and he recovers all he has lost, if he succeeds or the merits. If he don't own that, intended he should have no costs, & the Difend. has his costs taxed. But if he has actually paid the Difend. his costs in the C. below, th. C. will give him an $\text{£}10$ for them, for to them the diffe. is not intitled. This they say, is restoring the party to what he has lost. This is where Diffe. gets his costs.

But judgment below was as against Difend. and Difend. reverses the judge, what is he to recover? why all that he has lost. But the pteff. can enter now, but he would be a fool in this case, for his deed or action has been declared by the Ct. to be insufficient. But there may be cases when it would be well to enter. Suppose the C. C. is a plia or abatior. et. order an answer over. On th. trial the Difend. offers a witness who was admitted. Th. pteff. files a bill of exceptions and reverses the judgment. Now pteff. may enter & proceed with his case from the reversal does not quiet an end to the case..

The Sup. Ct. have sometimes no jurisdiction of the case, unless they are made so by the reversal on which case they may be entitled. But sometimes they have no jurisdiction over the subject matter, without regard to quantity or quality - as in the case of big & ways, a judgment on which subject has been reversed by Sup. Ct. It must go back to C. C. So in cases of complaints under the Statutes of Bastards:

Pleads and pleadings.

Writs of Error.

Assignment of Errors.

If the writ of Error begins with stating that such a case has been tried before such a Court, and state the whole record. Then the plff. says in rendering said judg^t the b.^{c.} erred and mistook the law and then states the error. He may state as many as he pleases. By the C. Law it is necessary to state errors only generally, but now according to their practice it is said they will not go to the hearing of particular errors unless they are assigned. I take the rule of Law uncontradicted by a rule of C. to be this that the judges are bound to look into the record, & if they find any error to reverse the judg^t.
560-37.-

There is another rule to be noticed, that errors in fact and errors of Law can never be assigned in the same writ. They must be in distinct writs. The reason is not satisfactory. It is this - Matters of fact are to be tried by a Jury, and matters of law by the b.^{c.} and therefore you cannot join them. But this is often done in a traverse to a part of the declaration, & a demur to the rest. But the rule is as above.

1 Rose 781. 1 Sid 147. 1 Wm 252. 3d. 58. 6aith 338.

Suppose however D. oft. comes in and does not deny the matter of fact, but pleads in, or calls it, mistake of transcription. This admits the fact. The C. will now try it. He is all law now. But if he intends to take advantage of the misjoinder of the two causes of error, he should have deserved for duplicity. 1 Salk 268. 2 L Ray? 1005. 6aith 338.

It is a rule that in assigning errors, you can never assign any thing as cause of error that contradicts

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the record. If the record is that D. & Co. is as a witness & appears by J. S. his vicar & curate, you can make no more mince that J. S. is not his vicar & curate, because it appears on record that he was. So any other thing that appears on the record, be it be what it will cannot be contradicted by an answerer.

There is another rule which appears unintelligible when compared with the authorities. It is this. When a judge is an advantage to a man, he cannot reverse it. But a reversal is often had when judge was in favor of the pflt. below. To be sure it must always appear on the record that some claim of his has gone agt. him & then it will not be in his favor, as when he declares upon 1000 £ & recovers 2 £

So where there are several contracts declared upon some of which are said to be usurious and some not. The pflt. recovers upon part, but he may bring a writ of error on the judge on the others, for the facts proved do not perhaps amount to usury. Barth 24. Bro. I. 609.

Whatever is pleadable in abatement is not subject of error if not pleaded. Vice of it was a suit or a bill no judge c^r. be rendered, it is error whether pleaded in abatement or not. As if a joint court is sued alone and she does not plead it by way of abatement, it would be error to render judge against her. The court is abated de facto to the moment it is brought. Bro. I. 125.

Again - there are two documents in common and one brings the suit. Now the pflt. may plead on abatement, but he does not, and judge goes agt. him. There is no error in it. Saltk 4.

Pleading pleadings.

Writs of Error.

Sometimes a judgment is erroneous, but it is under such circumstances that it is in the party's power in whose favor it is by releasing the part which is erroneous to make the judgment good. As where the jury gives more than the plff. demands. Now judgment on this verdict would be erroneous. But the plff. may release on the record the sum given over & above what is demanded and the judgment is good. This is often done especially in notes of hand, where the sums are contained a great time, & the interest exceeds the sum demanded. But in these cases the plff. might amend his writ or motion to the Co. 1060115. Roll 764.

There is one thing arising out of this subject which has not been attempted to be done in Conn. that the Com. may themselves render a judgment contrary to the verdict provided they do not increase it, so as to make it comport with the declaration. I see no objection to it. The old authorities are this way & I have seen no modern case w^rt it. Vol. 45. As where a suit is brought to recover two sums of money loaned. Usury is pleaded to both, and the plff. in pleading usury to one states, that it was contracted by a friend of, and as to the other omits to state completely. The jury bring in a verdict for plff. that he recover both sums in the two loans. There has been no case tried upon one sum you will see. The verdict then is bad and resists this, for the issue is unanswerable. Now the plff. may rule out one of the sums & take judgment for the other. Co. 8. 104.

The general issue to a writ of error is "in mensa et therr. ex alibi" and it is all the defense that can be pleaded except it is a matter of fact which you deny, or in equity.

have something which is subsequent to the judgment as a release of all errors or debts. 1 Roll 788.

Another general rule is this, that where there is a judgment after service, if it is erroneous as to one, it is erroneous as to all. They say the judgment is entire, and must be wholly good or bad. Our practice is different... in action of assault & battery is brought v. A. & B. C. was an infant. & did not appear by Guardian. The judgment to all is erroneous. Upon English principles it could not be reversed as agt. C. and stand good agt. A & B. With us it can be. By our mode of proceeding there is no injury done... There is no contribution between the parties. A and B can not complain if C gets clear, for they could not compel C to pay anything, if the Jeff. should collect his £^{sterling} out of them or one of them. 2 Inst. 289. 1 Roll 766.

But where there are two distinct judgments complained of by a will of Error, in England one may be reversed & the other stand good. As in an action of account the judgment is quodam competitum. but in the action of the Auditors there is a manifest error. A will of error is brought to reverse these judgments. One may be reversed & the other stand good. So in the case of an Executor who is sued and judgment obtained, and Exec. goes out on the property of the testator in his hands. Then a scire facias issues, or proceeding on which there is error. An Executor brings a will of error to reverse these judgments. One may be reversed & the other stand. 3 Inst. 322.

One thing out of its order. There is an instance in which the Court of Exchequer exercise the power of

Pleads and pleadings.

Writs of Error.

rendering judgment themselves. But it is in a case where there are no facts to be proved. It was only a question of law arising upon a special verdict. I do not see that there is any infringement of principle, and in similar cases our C. of Errors have done the same thing. *Caith* 319.

One thing more. That the person recovering the judgment shall be restored to all that he has lost, is a principle never to be infringed upon. What how is he to be restored? An recovery of B. takes out C. & recollects the money by the sale of a pair of Horses at the post. Now A. brings a writ of error & reverses the judgment. What is B. to be restored to? The horses? They were sold to C. as bona fide. Can he sue C. in Trover? No. He must in such a case receive a judgment to recover out of A. the value of the horses. He cannot sue the Sheriff neither who sold them. He took the property before the removal, and he was bound to execute the process. The principle above which relates to C. is for his protection, & is a principle of policy altogether.

Now suppose in England A. had taken out an ejectment and had the horses appraised off to him. Then B. reverses the judgment. While the horses are in A's possession and are his property. B. can recover the horses out of A. and according to the modern idea, he would not be a trespasser to go to the Stable and take them. If a term of years has been held under an ejectment and B. reverses the judgment the master will hold it. But if it was intended so that it was his property, B. would have it on the reversal. *8 Co. 14. 3. 670. 8278. 11 M. & S. 778. 11 Eliz. 108.*

Pleadings and pleadings.

Writs of Error.

There has been a great question, whether we have a mode in chancery land of appraising Land or see under an Exec^t. This is unknown to Common Law. Now suppose A recoures d B and lays upon Land and has it appraised to him & then sells it. Afterwards B. recovers the judgment. Now can C. hold the Land agt. B. - It has no title to the Land, because the judgment was reversed, and the sale was a private one, not under the sanction of the Law, as by, or due in market court, by the Shff. or by him at the post. under the Exec^t. Our Courts have determined that C. must loose the land, and he is no worse a situation than he would have been, had he bought another parcel of Land, the title to which was defected.

There is another case. & the action is brought agt. the Shff. for an escape. Before pl. a pleader th^e judgment agt. the escaper is reversed. Shff. pleads new title now and it will ^{avail} him...

Supplement. Pleas & Pleadings.

(Note A.) During the time of the Commonwealth pleadings were in English.—(1. Page of the title.)

(Note B.) There is but one exception to this rule, and that is the following. It is true the first or major proposition is not generally expounded in terms at length, but (the exception) where a particular custom is pleaded, it must be so expressed. The reason is, the court are not supposed to be acquainted with particular customs, & therefore the rule is as to the Major proposition, that it "is to be decided by an issue on Law, yet in this case the existence of the custom is matter of fact. It is to be proved & tried as a matter of fact & as such the jury are find the verdict."

(Note C.) When I speak of stating conclusions from facts, it is necessary to illustrate. These conclusions are always stated as facts. E.g. in declaring upon an implied affidavit the plaintiff states the indebtedness, which is a fact, and he goes on further & states a promise, which is not a fact, but a conclusion from the fact of indebtedness. The promise itself exists only by fiction & presumption of Law.

(Note d.) This general rule that all pleas should be direct, not any avermentation to, requires a qualification. I shall treat of it under the head of "Declaration." According to y^e general rule, the word "whereas" is not sufficiently positive, but there are cases where it has been held sufficiently positive. The rule in modern times has become somewhat relaxed.

Supplement. - Pleas and pleadings.

(Rule C.) The reason of the rule as respects the necessity of alleging time & place, is somewhat different. The reason why the usual allegation time is to bring forward certain day upon the record to prevent loosing, for if it is not stated the contract may have run an indefinite length of time & a cause of recovery be barred by the Statute of Limitations. The place must be alleged, because anciently every issuable fact must be tried near by a jury not only of the County, but of the neighborhood where the cause of action arose. It is true an additional reason was that there might be certainty, but the governing reason is as above with respect to the Jury. 12 Ed. Com. Pl. 20. 23. 4. 2 Edward 5. 37. 3 Bl. 6. 384. 5. Com. 19th Amendm^t. Bl. 6. This rule is relaxed in modern times, for the jury are not taken from the neighborhood, but from the county at large.

(Rule f.) General estates in fee simple may be generally alledged, i.e. the party pleading such title is not bound to show how or when it commences. But contra when any estate other than fee simple is pleaded, the time & manner of its commencement must be pleaded alledged. It is then necessary in allegend a fee simple, if the party alledge that he is so possessed in fee. The reason is, estates in fee simple may commence by a mere matter of fact, by a tort committed, as by dissencion. This then is matter of fact. But contra, a particular estate always commences in a manner which involves a matter of law, as by fine, recovery, deed, devise &c. which are matters of law, & the Court in this case are to judge. The former, i.e. a fee simple estate commences by matter of fact, & this the jury are to judge. 2 Wms 47. 2. Ray. 333. 3. Will. 72.

Supplement. Pleas and proceedings.

(Note g.) So also if when pleff. sues for an entire & indivisible thing, & himself shows that he has no title, or to part the Deed as is bad. This rule is not universal, for the distinctions see, 1 Edward 285. b. 1160 45.

(Note h.) And 4th. That the Defendant may be enabled to plead the Judgment to any subsequent action brought for the same cause. This reason is instantaneous.

(Note i.) There is said to be an exception, this rule in actions brought on Bills of Exchange vs. the Drawee and actions on Promissory Notes, vs. the maker; because as Mr. Hale says the drawing of the Bill, or executing the note is of itself an actual promise to pay, & therefore none need be alledged substantially, but merely a recital of the facts. If one might be permitted to reason upon this rule, say Mr. Gould, I shd. say it is not founded on principle. I do not mean it is not true, for it is settled. But established on the whims of a great man. I cannot see the difference between this & other cases of Assumption, then can an assumption be raised, when there is nothing more appearing than the evidence of it? Stalk 12. 8. Atk. 224. 2 Ray 358. 2 H. 6. 13. 196. 2 New H. 63 note 4. 2. 1. 45. v.

(Note h.) If there are 2 or more persons jointly entitled to an action, as joint obligees, & one of them dies, his Executor sued joint in the action, with the Survivor, because the whole might be of no service to the Survivor. Wor. Phil. 445. 1 East 497.

Supplement. Pleas and proceedings.

(Note C.) When a Declaration is demanded to, for a misjoiner or Counts the Jeff. can't enter a Nolle, unless you wish to do so & thus destroy the effect of his misjoiner. Now he can't by his own act thus disuse the Warrantee. He seems to be the practice in Eng. that the Jeff. may enter a Nolle prosequi before a Warrantee. By entering it thus, he withdraws from the record the defect, & his Declaration is made good without injury to the Defendant. 17 H. 13 C. 103. & 17 R. 360. 1 Ground. 285. 380.

(Note M.) An action of Debt for recovery of a penality of a Stat. can't be brought in a foreign Country. So too where the subject of the action is local, the action itself is local, tho' it is in form a personal action. As in an action of quare clausum frumenti, this is a personal action, but the trespass is committed on a local subject. So also in an action of Debt or Count vs. the assignee of a Lease, the action is local, & yet if an action of debt or Count is transitory, it is local because the contract is real & runs with the Land. It may be proved to be local by deduction 1. If the Land is local, 2. The Contract as between the Assignor and Assignee is local because it runs with the Land, 3. and therefore the action itself is local. But by way of distinction, the action of debt or covenant as vs. the lessors of the Land is not local. The reason is the lessor's liability to the lessee is founded upon privity of contract, whereas in the former case the assignee's liability is founded upon privity of estate and there is no actual contract between the Assignee & Person. 3 East 573. 580. 1 Ground 24. 16. 7 loco 2 n. 8. M. 1724. 6 East 183.

Supplement. - Pleas and pleadings.

Note N. : This rule of the C. S. does not affect
any plaintiff in an action Real or personal as varied by the
local Laws of some of the States. In all those where it is
allowable to hold real estate he may maintain the action.
In some of the States there are Laws enabling Aliens gen-
erally to hold real estate. See the American Edict of the same
British Encyclopedia title Alien. By a Stat. of the U. S. by
which children of our Citizens the born abroad, are naturalized
from aliens. This is a derivation from yr. C. S. rule, for by
the C. S. children born out of yr. country with naturalized
parents were aliens. So also by a stat. of yr. U. S. the children
of persons naturalized here are entitled to yr. same rights, if
they were under age at the time of their parents naturali-
zation, & at that time residence within yr. U. S. But this
privilege is not communicated to the adult children
of yr. naturalized parents, or to those under age which are
resident in a foreign Country. Stat. U. S. Vol. 6. P. 79. Encyclop. supra.

Note O. : So a application that the p^t was known
to be dead by the name in which he died, deserves note, tho'
name mentioned in yr. Defendants, filed, 18700. 1 East 542.

(Note P.) There is a material distinction between
taking advantage of a variance in the 2^d & 3^d way.
In the 2^d way (i.e. in evidence in the 3^d trial) if the defense
comes over of yr. bond, lays it before yr. jury, & thus proves
it was his act, & the jury must find for him. In the 3^d
way, the objection is made to the fact that it shd. not be given
in evidence & they must reject it.

Supplement. Of Pleas and pleadings.

Note 9. But issues in fact may be taken upon the pleadings which follow yr. declaration. But this are called "Issues" & not General or Special Issues. E.g. Suppose the plea in bar is traverse, this will be called an "Issue", & not the General or a Special Issue.

(c. Note 8.) But the proposition that such pleading as can be by verdict requires qualification. It is said a negligent plaintiff is cured by verdict. The meaning is, if yr. parties go to trial upon such issue, the verdict cures yr. defect; tho' it is to be observed that yr. defect is not thus cured, if yr. Verdict is found for yr. party who denies such issue, tho' if found for yr. opposite party it is cured. E.g. The deft. pleads a release of yr. cause of action since yr. date of yr. writ. The plff. denies his release since the date &c, and thus leaves yr. implication of his having released before yr. date &c. Now if verdict is found for yr. plff. it only finds that he has not released since the date of the writ but leaves the implication that he did it before, & therefore yr. defect is not cured by verdict. But contra, suppose yr. adv. is such issue as forms for yr. Dft. The verdict then finds that the plff. has released since yr. date &c. The defense then is as good as if yr. plff. had rejected the release before yr. date &c & had been so found on trial, therefore the defect in this latter case is cured. The Rule of a few however has rendered such pleading ill or Special Damurrer only.

Note 8. In the other hand pleadings form a complete system & must conclude by counter. If after counter is found to be in contradiction with a previous statement, the adverse party would have the same right.

Supplement. Pleas & pleadings.

might reply over & also conclude with a verification
as on his infinitio. S. Ray. 98. Barth. 58. 3 Bl. & 309. Again
when Dft. alleges distinct matters of defence to different parts
of the Declaration, he may conclude each part with a
verification, or he may conclude all with one.

This is to an action of Assumpsit for 100 $\frac{1}{2}$ the Dtor. should
pledge payment as to 50 $\frac{1}{2}$ & accord & satisfy as to the
other 50 $\frac{1}{2}$, he may conclude each branch of his defence
with a verification, or the whole defence, with one.
1 Sand 338. 339. 340. Barth 312. 298. Barth 43.

(Note L.) The same rule holds as to all the subsequent
pleadings. If y^e pef^r makes an entire answer to the whole
plea in Bar leaving in fact a material part unanswered,
his replication is ill in toto. 10 T.R. 40. 1 Sand 28 N. 2. 337. 2 Bl. 137.
(N.B. y^e above inserted by mistake. See in y^e body of y^e title pg. ¹ next page from
where it is called T.R.)

(Note M.) A Defend. need not alledge in his plea more
than what prima facie amounts to a sufficient answer
to the Declaration. Clearly then he need not negative
the possible answers the pef^r. may give to his plea. S. Ray. 400.
2 Wilb. 100. 1 Sand 298.

(Note N.) Pleas in Bar regularly begin with an
action non, i.e. the Dfe begins by saying the pef^r ought
not to have his action. This is the common form. They may
begin with an averri non debit. where the plea shows there
was never a cause of action. The reason is obvious. In

Supplement. - 8th & 9th Readings.

In one case he says there never was a cause of action
and are now debts. In the other case he admits there once
was a cause of action but that for some reason of p[er]f[ect]
it is now declared, action now. Salk 516. 2d and 139. -

(Note N.) When a traverse is presented by special mat-
ter of indictment, like Laws waits it a special traverse.
If it contains he must be mistaken. Salk 516. 17-18. 124. 149.
Now if concern the right of the traverse decides its char-
acter, & this only. If the traverse denies all that is al-
leged in any other side it is a general traverse. On the
other hand, if it goes to only a part of the allegations
it is special. -

(Note O.) The General Traverse "De iniuria sua pro
prio absque lati causa," is appropriately adapted to answer
matter of fact. It is however generally a good answer to a
justification, where the justification consists of mere fact
& does not contain matter of record right, title or interest.
Salk 154. 6. 156. 8. 600. 67. Com. Dis. Pleader 5. 20. 21. The reason why
the absque lati causa is improper where there is matter
of record to is that this sort of Traverse is wholly inappro-
priate to the domain of such facts. But tho' the replication
de iniuria &c concluding with an absque lati causa
is not proper when part of the plea consists of matter
of record &c yet in such cases the pleit may reply with de
iniuria sua &c and then conclude with a Special Traverse
at any particular point of the record right &c. How it thus a-
voids the impropriety of the General Traverse, absque
lati causa. Again the general traverse de iniuria &c

Supplement. Pleas and pleadings.

may be replied in its general form where the matter of no
concern to it is alleged only by way of inducement. So
where this is the case the inducement, otherwise the genuine
travers does not make it a part of the issue. Com. v.
Plead. &c 20. 21. Davis 156. 8 Co. 67^o 113 and 320.

Note y. I find a late case decided in Mass^o
where it was holden that Defendants cannot sever on
this plea except in actions sounding in Tort; not in
those sounding in Contract. The reason assigned is if two
or more are sued in Contract they may join in their de-
fence, with safety, for if it is not found w^t. both methods
of claim can be subjected. But suppose (says t. L) they
can't agree as to the plea proper to be pleaded. In such
case - say perhaps the Law will never compell y^r Defendant
to make joint answers. One or the other must have his
own defence & join ex chancery of the other, and who shall de-
termine which? It is beyond the power of the Ct. to do
it. And it is manifestly unreasonable that one shd. force
shd. be compelled to join with his Co. Def. in a defence
which in his opinion is a futile one. It certainly can
not be in those cases where y^r Defendants are unwilling
to join. - See Mass R. 444.

(Note 3.) But I wish to have you distinctly observe
that this is by virtue of y^r Stat. 27. Ed. Ch. 16. You find the rule
laid down by some writers as if this was a rule of C. L. Law. But
it is not so, for all C. L. Law advantage could be taken of
such defect by General Demurrer.

Supplement. Pleas and pleadings.

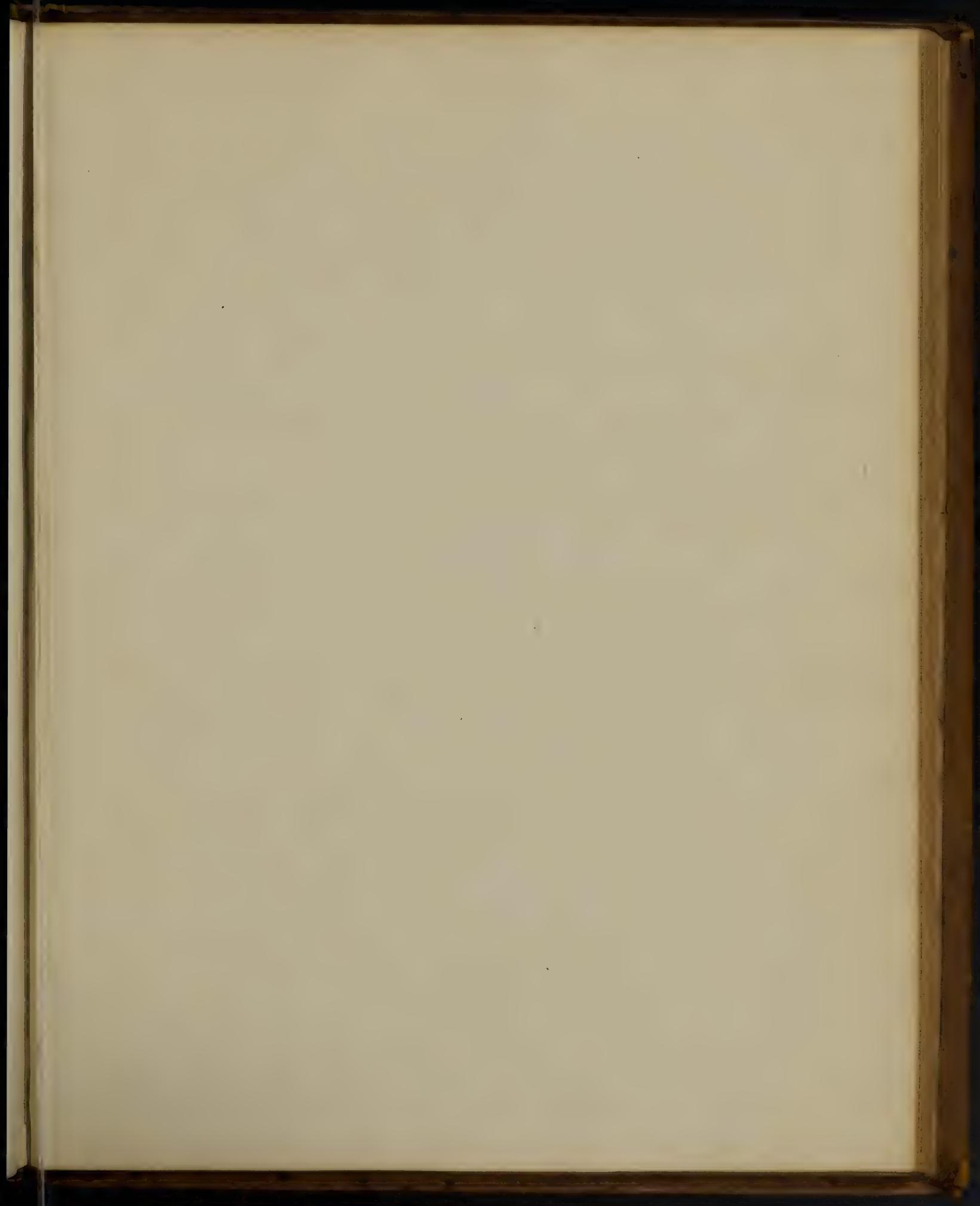
(Note a.a.) And it has lately been determined by our Court of Errors that the party's own oath is not admissible to prove the fact of loss. Coleman v. Soc. etc. 110. 1810. A case was there little much relied upon in argument by the defendant, founded on 2 Stac. 1106. But this case is not ad idem. In that case the party was allowed to testify, but it was upon a mere question of practice.

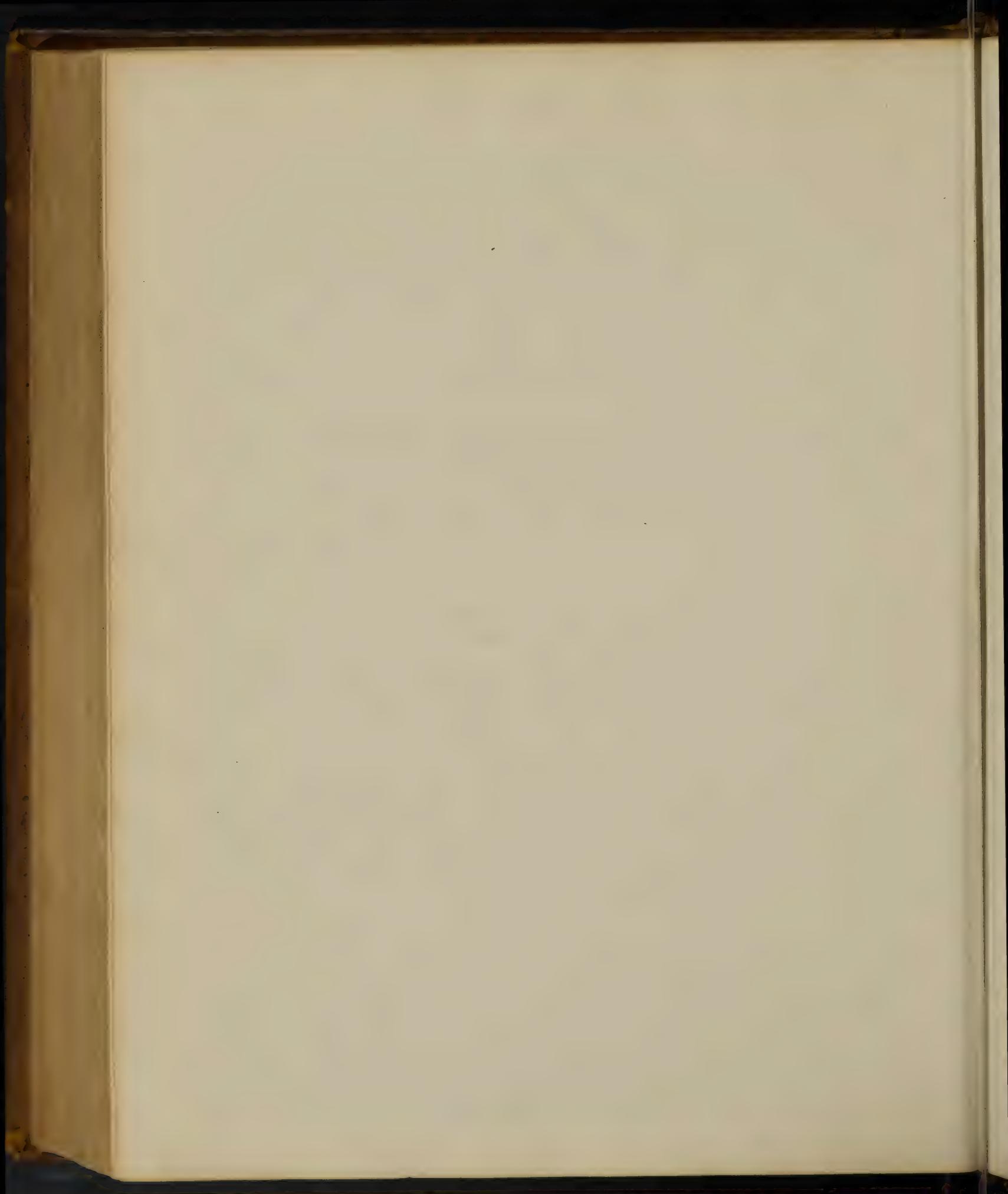
(Note b.b.) But to take advantage of the error the party carrying on must enter his prayer upon the record, otherwise the regular refusal will not appear & Error cannot be predicated upon it. —

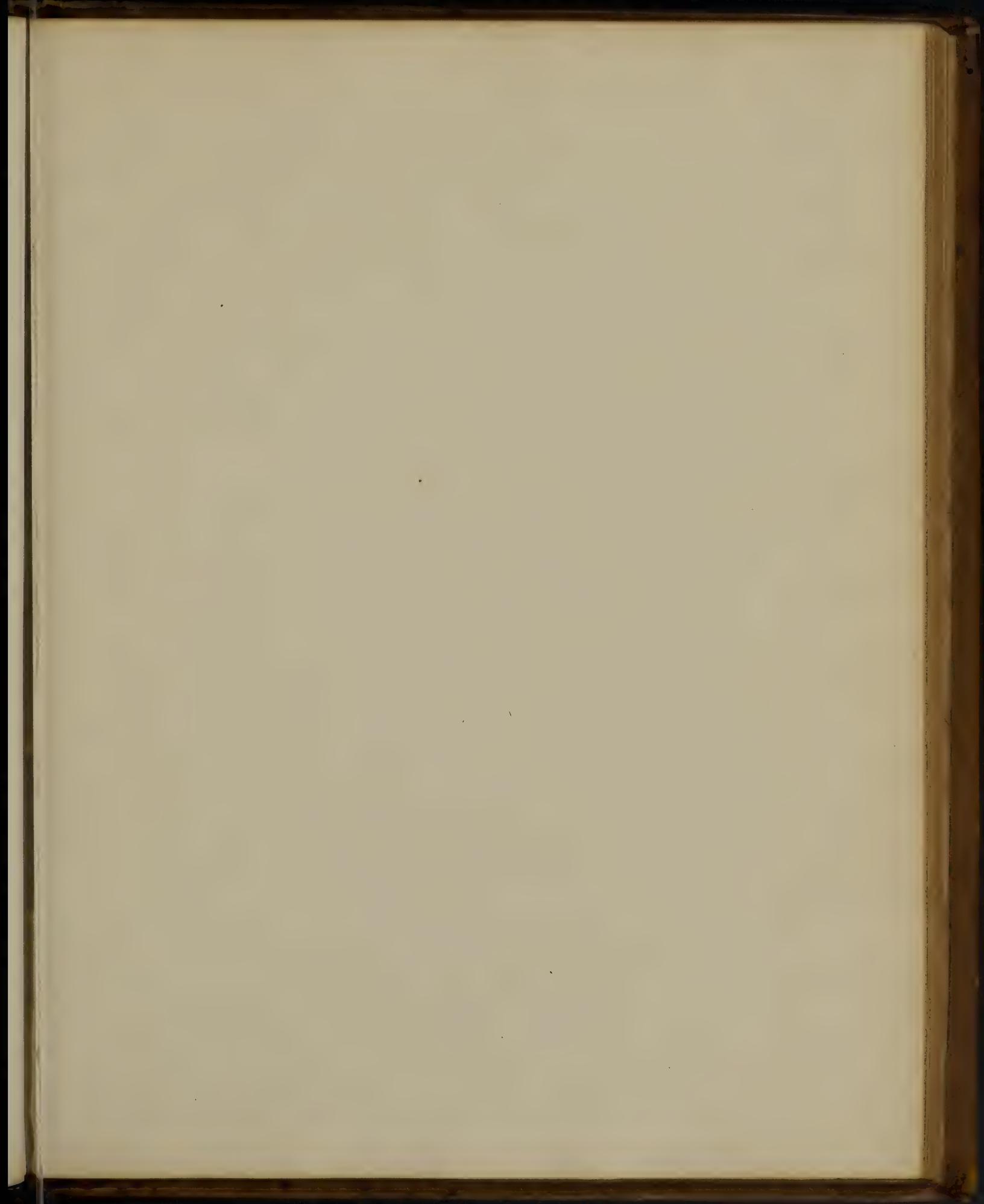
(Note c.c.) You will perceive from the forms that it is usual in England to conclude a Summons with a recitation. This answers no good purpose however for the summons closes w^t pleadings. See 172. 1 Rec. 24. & 1106. 12.

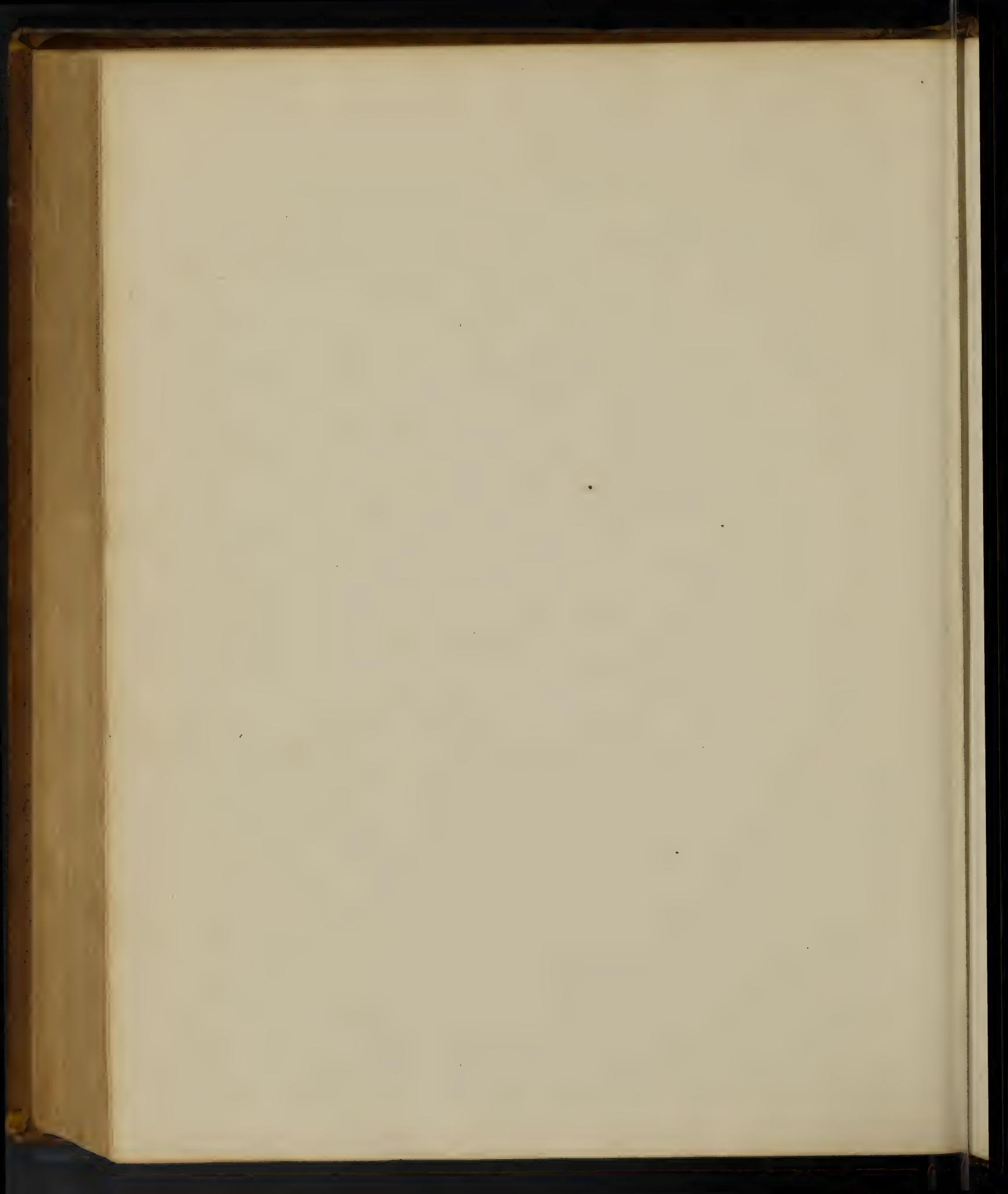
(Note d.d.) The Stat. of R. 171. does not extend up to all presentments, indictments or actions on personal Statutes. As to these the rule remains as at L. L. Law. From all debts on them may be reached by final demand. Compl. q. 7.

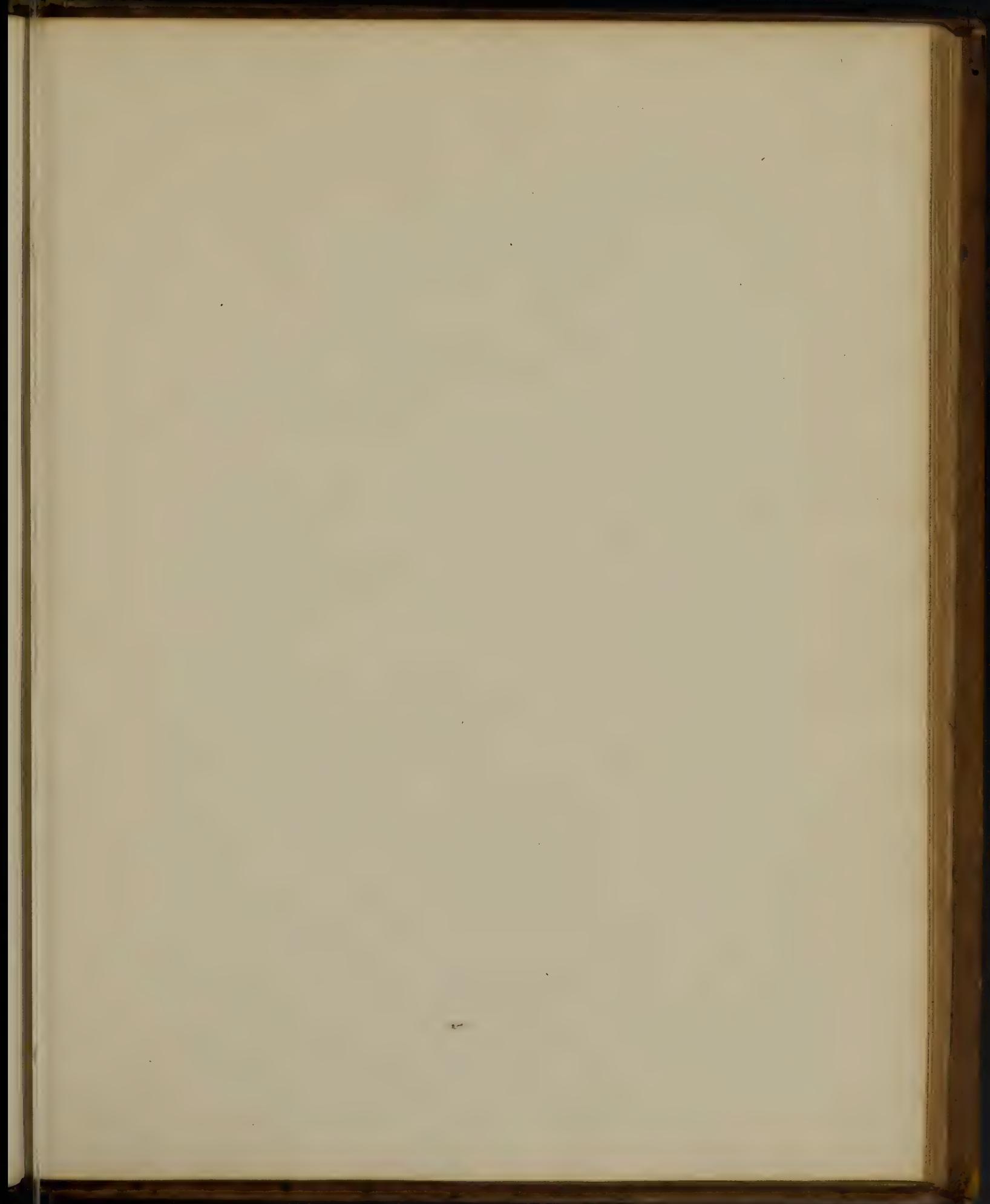
(Note e.e.) Thus if to file an obligation, payable on a certain day, the wife pleads payment before th. day, & the issue appears for f^t it is immaterial & he cannot have judgment but it is such issue the party had for refuge, it is material & decisive of the pleading the fact of payment before th. day relieves her from his liability, & the filing without cause of action.

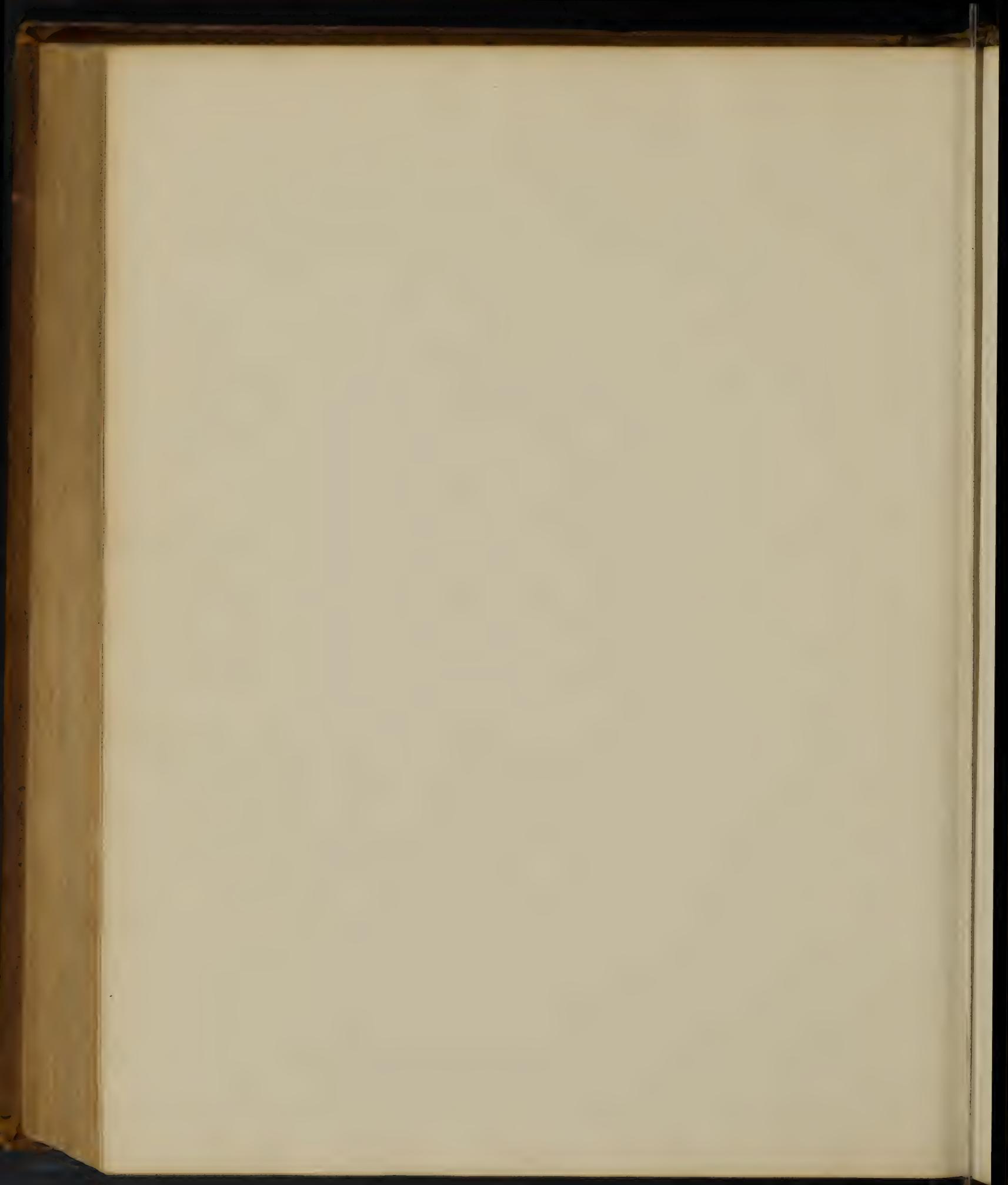


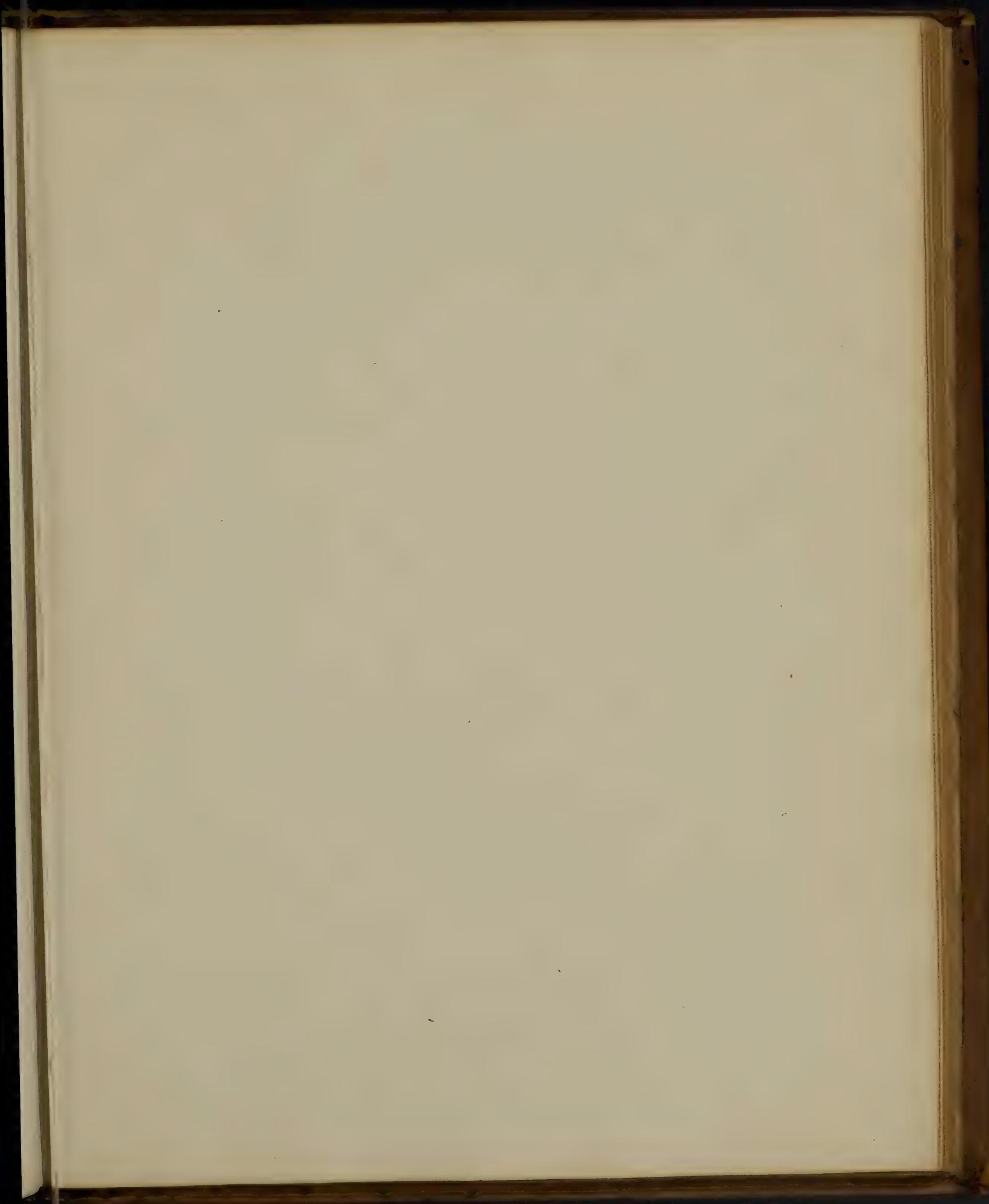


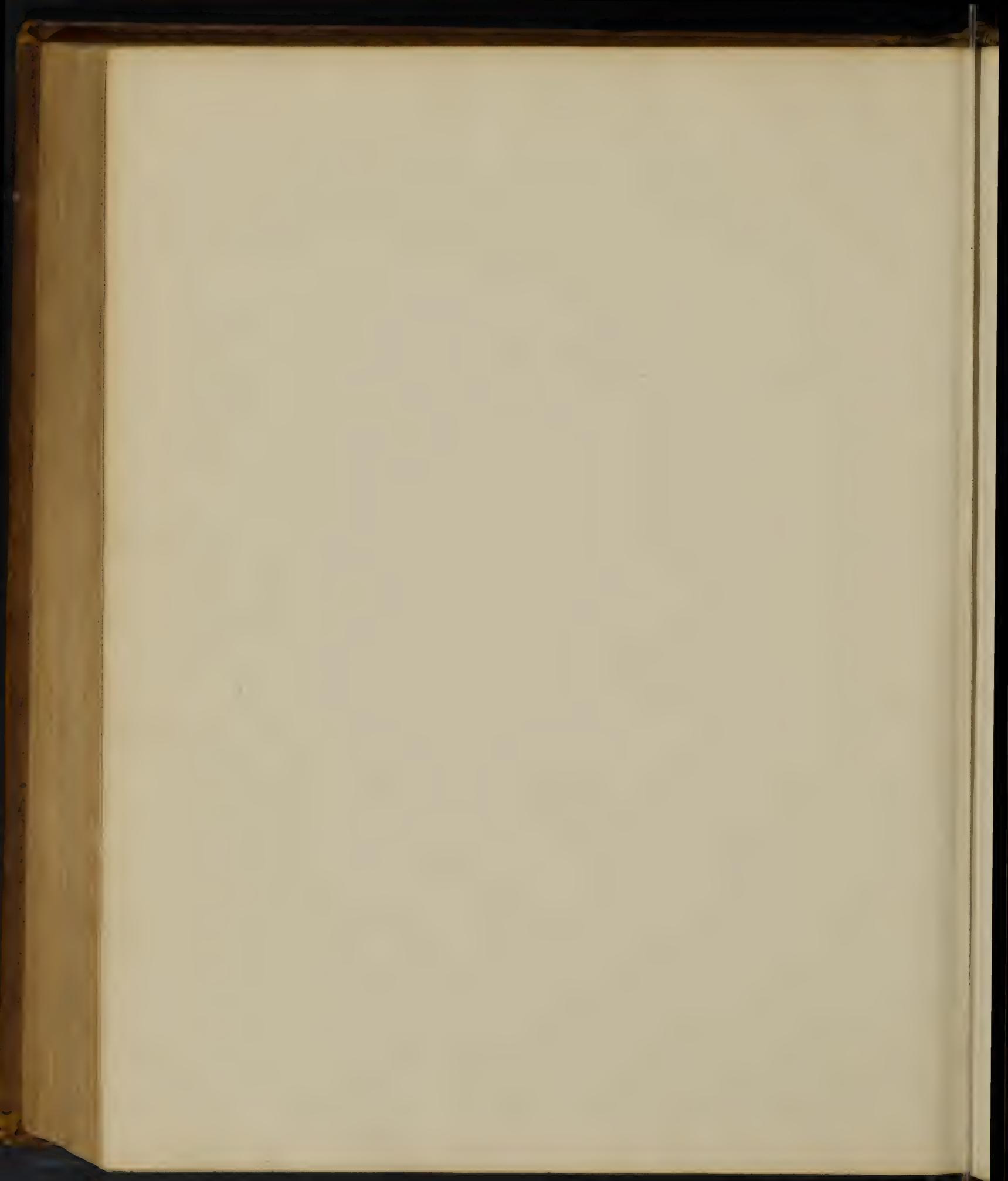


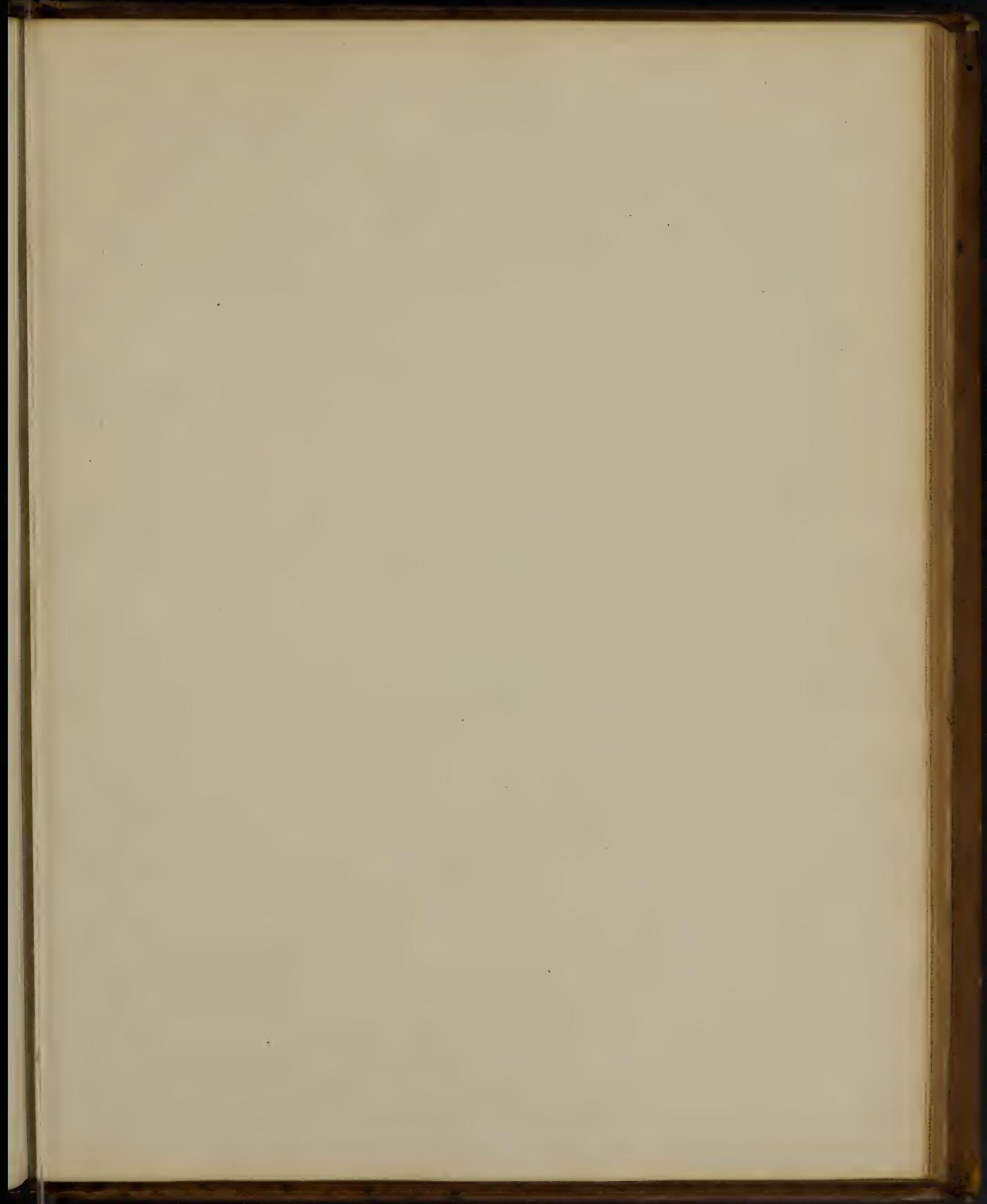


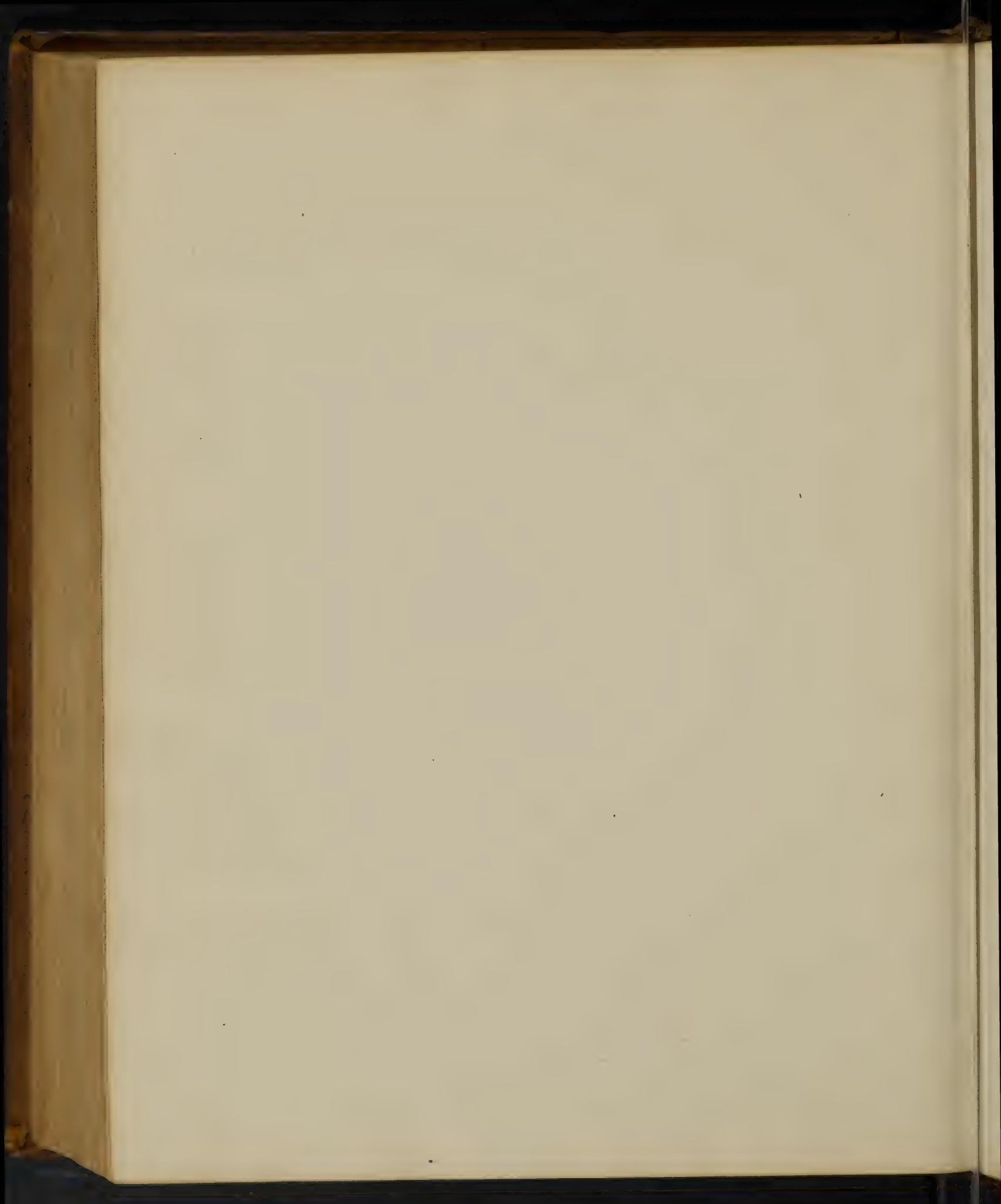


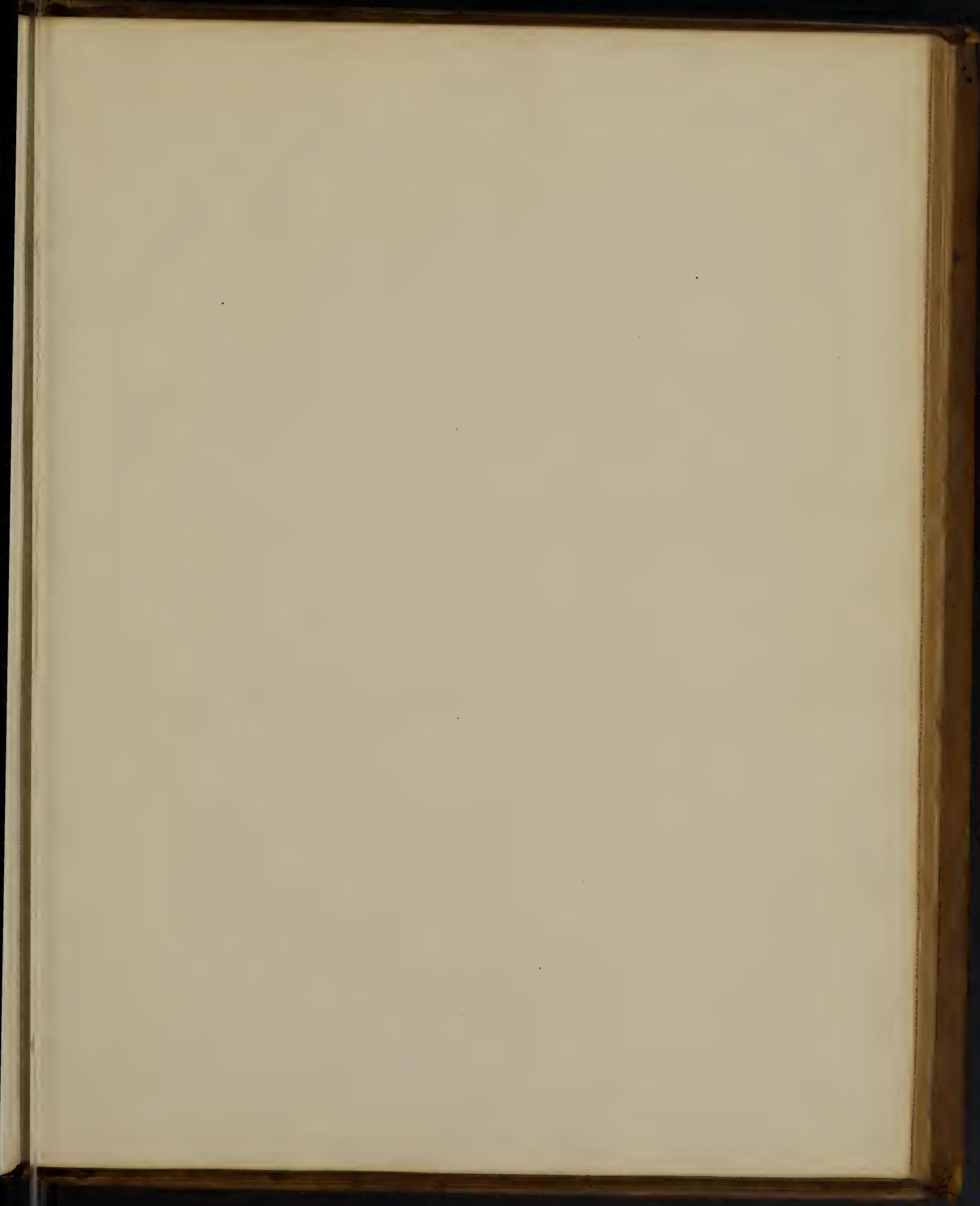


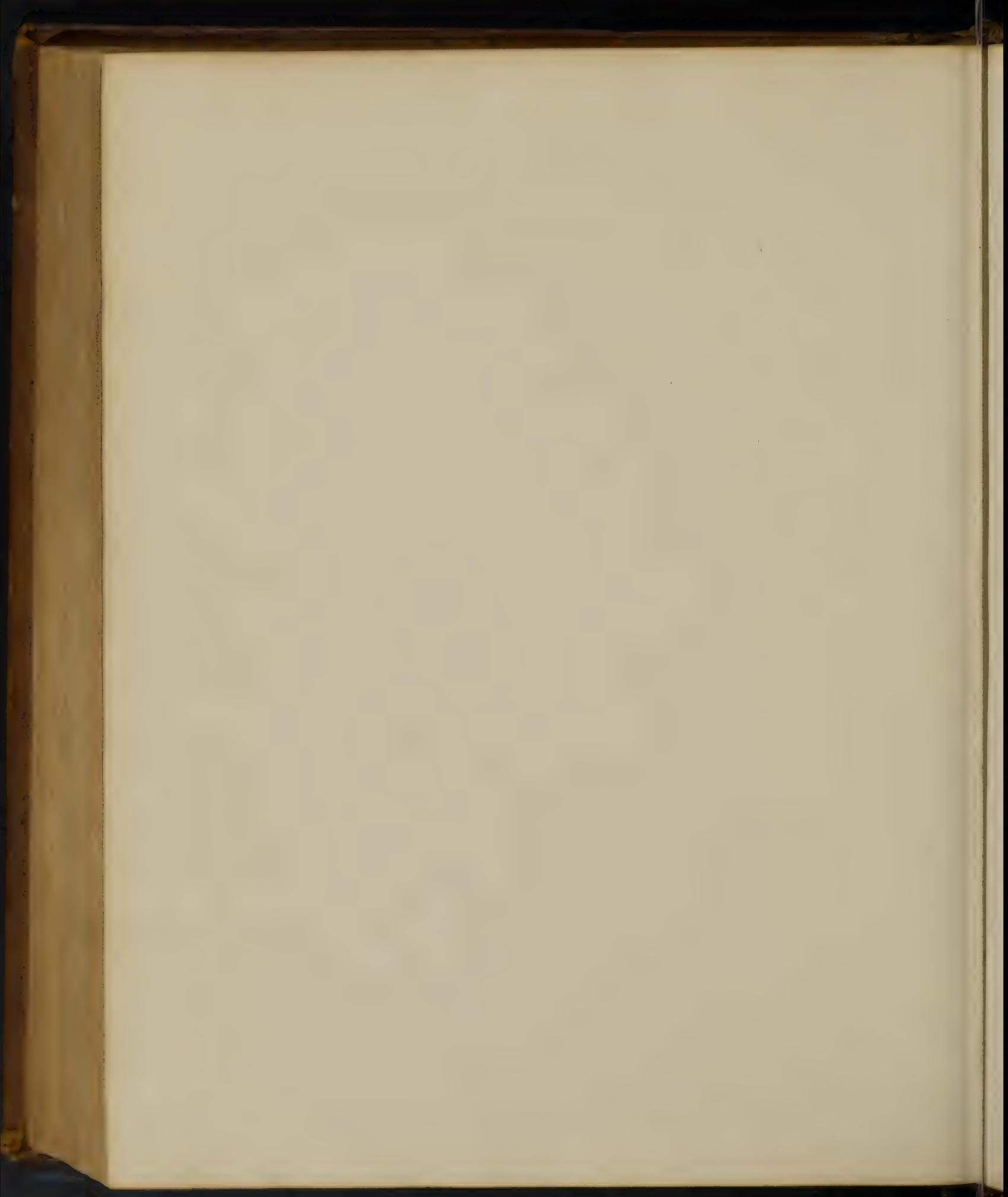


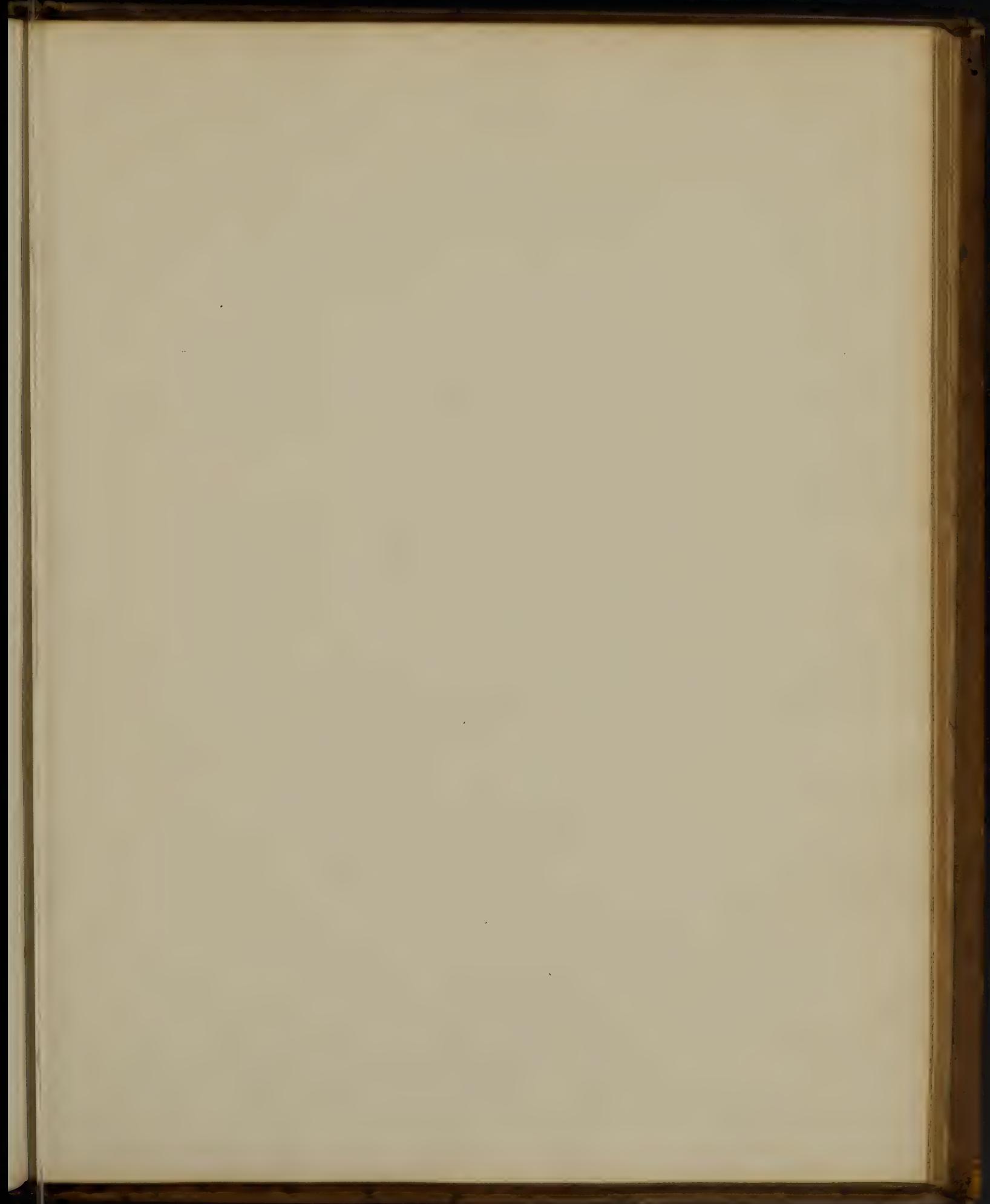


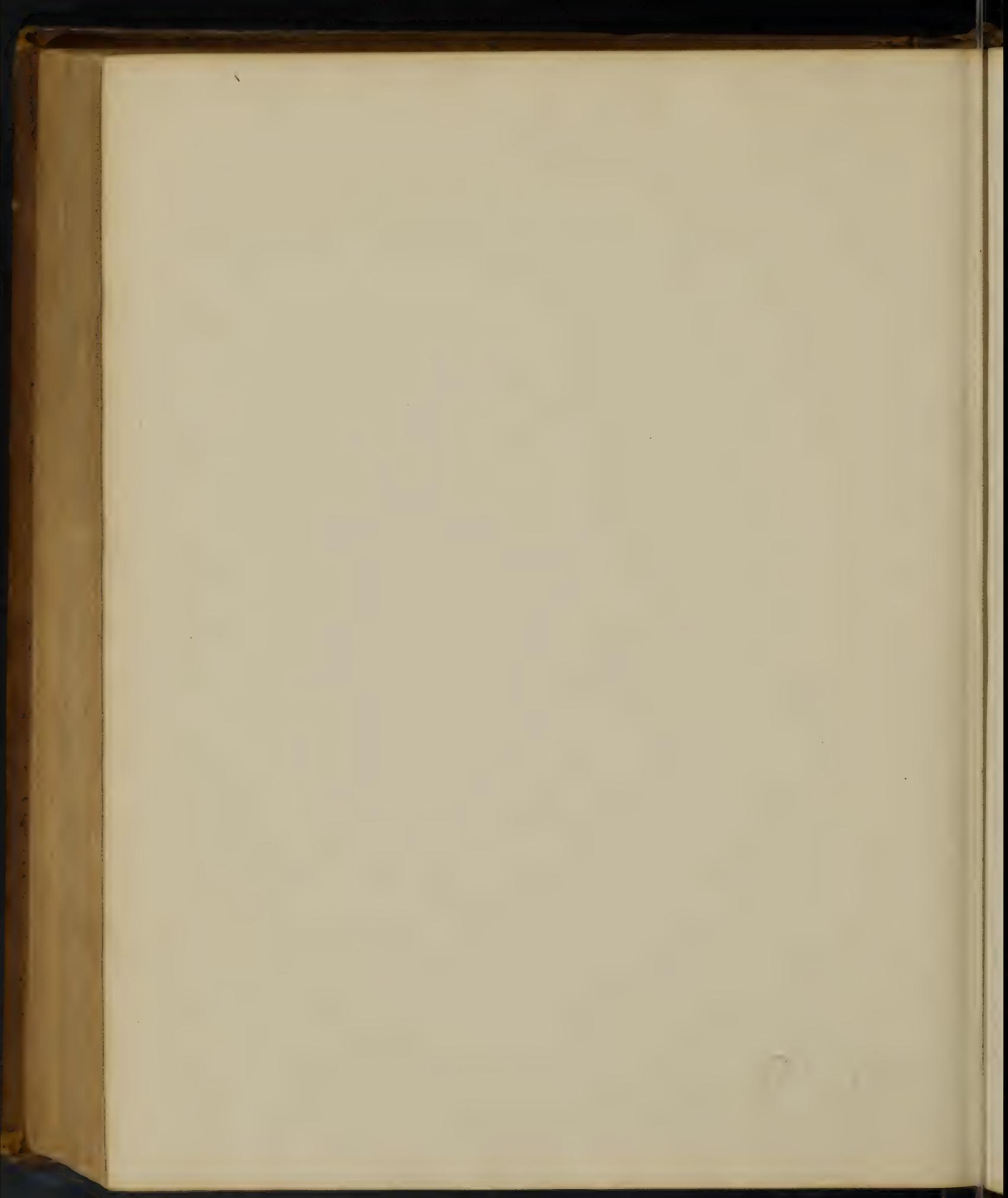


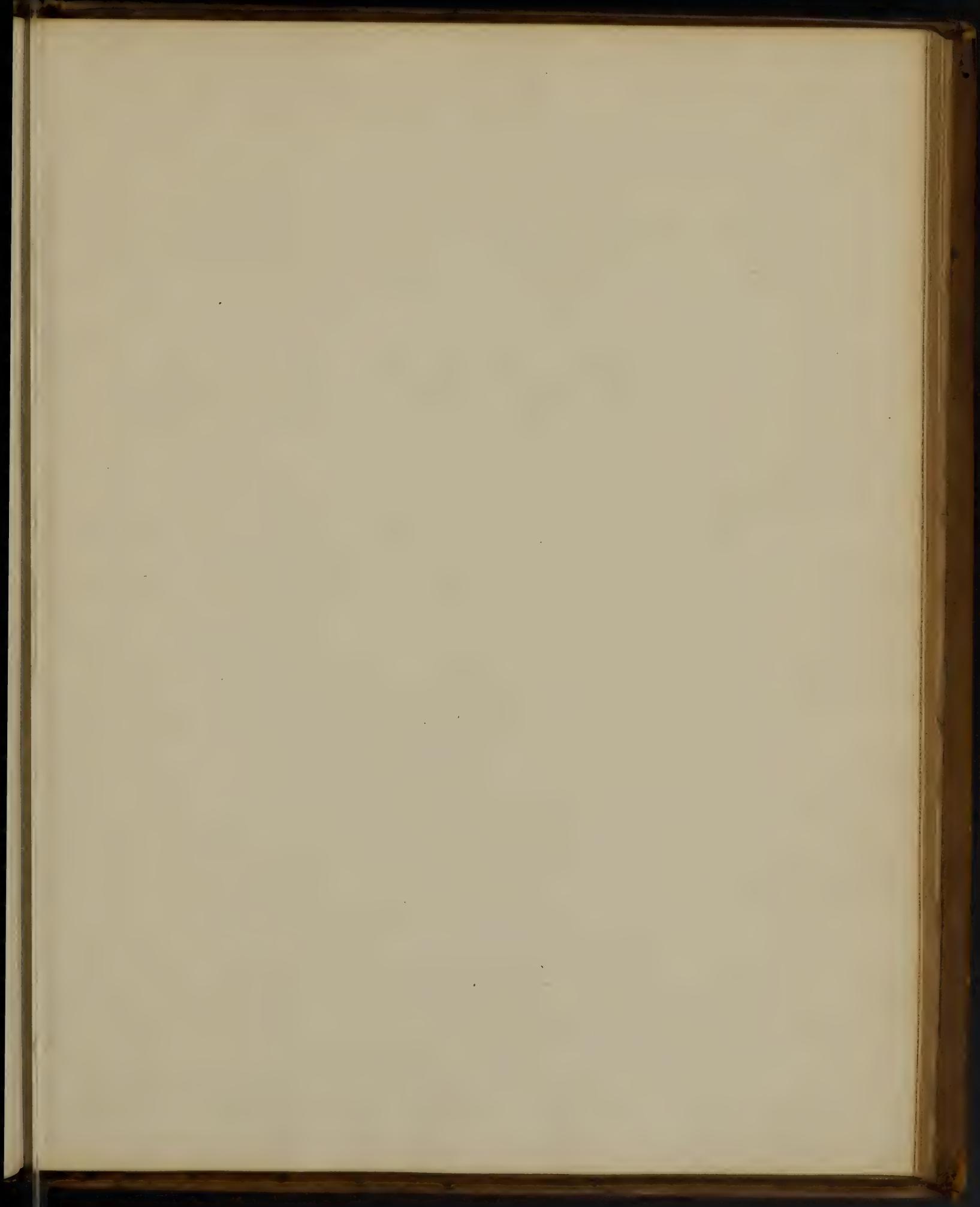


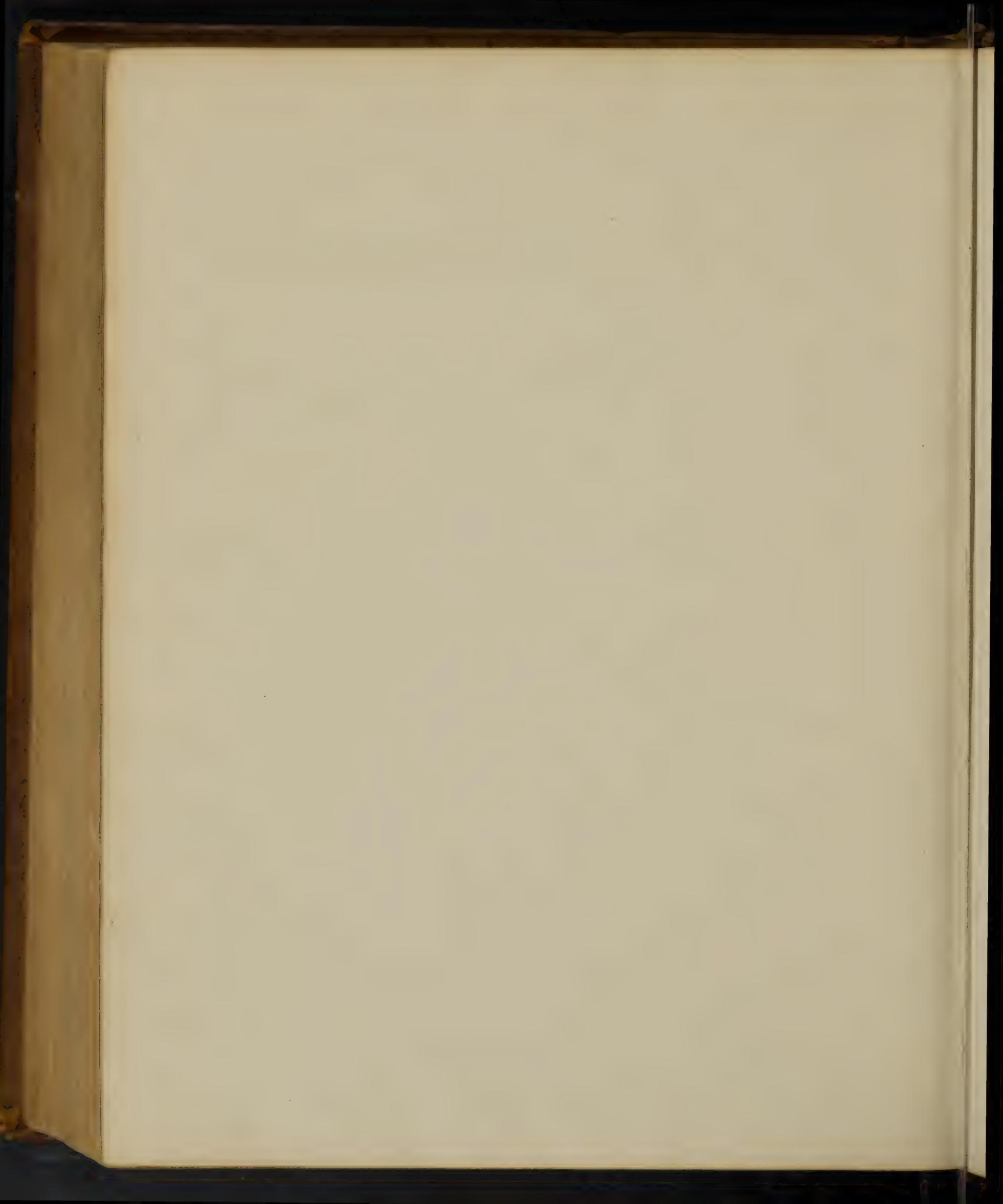


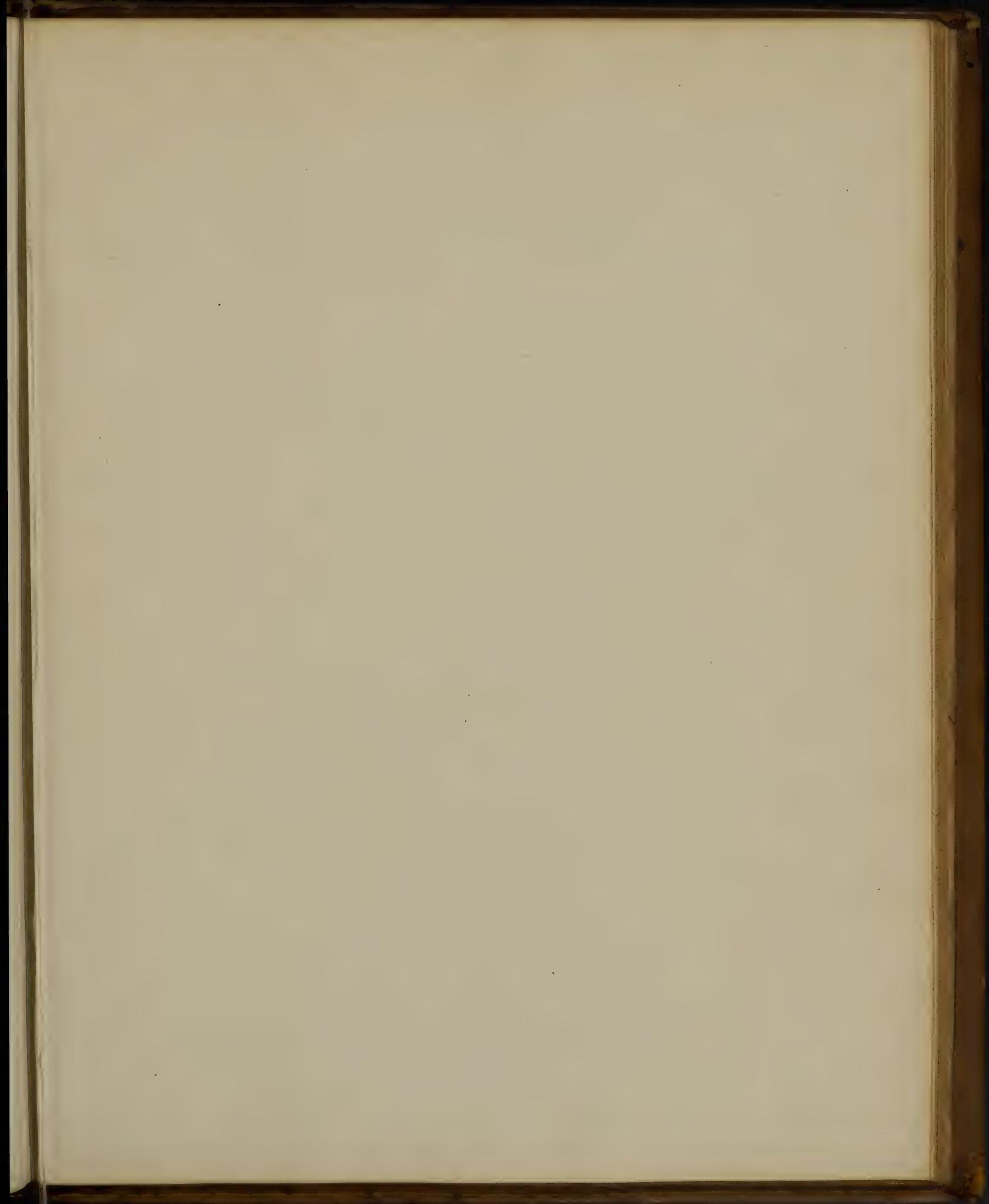


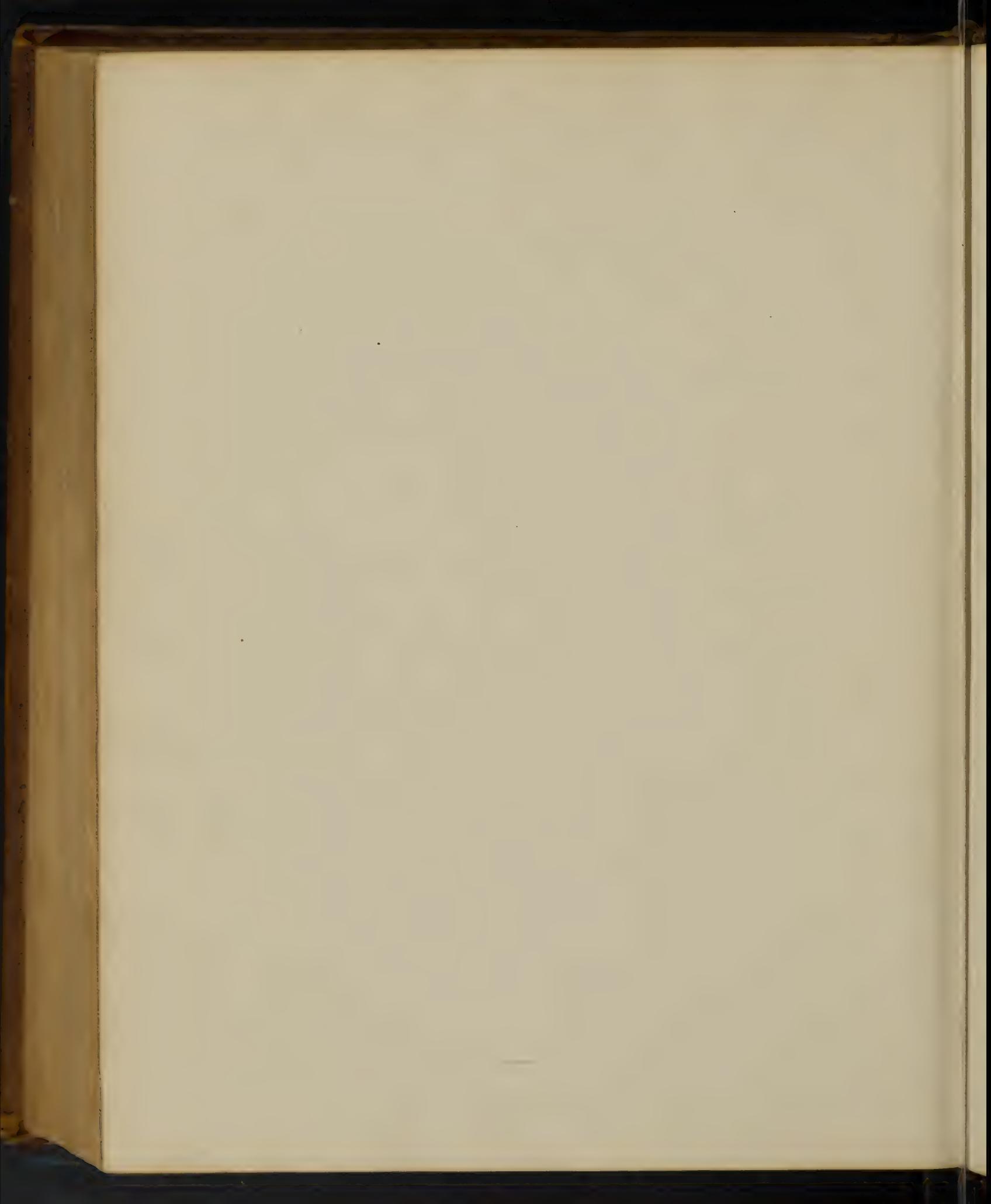


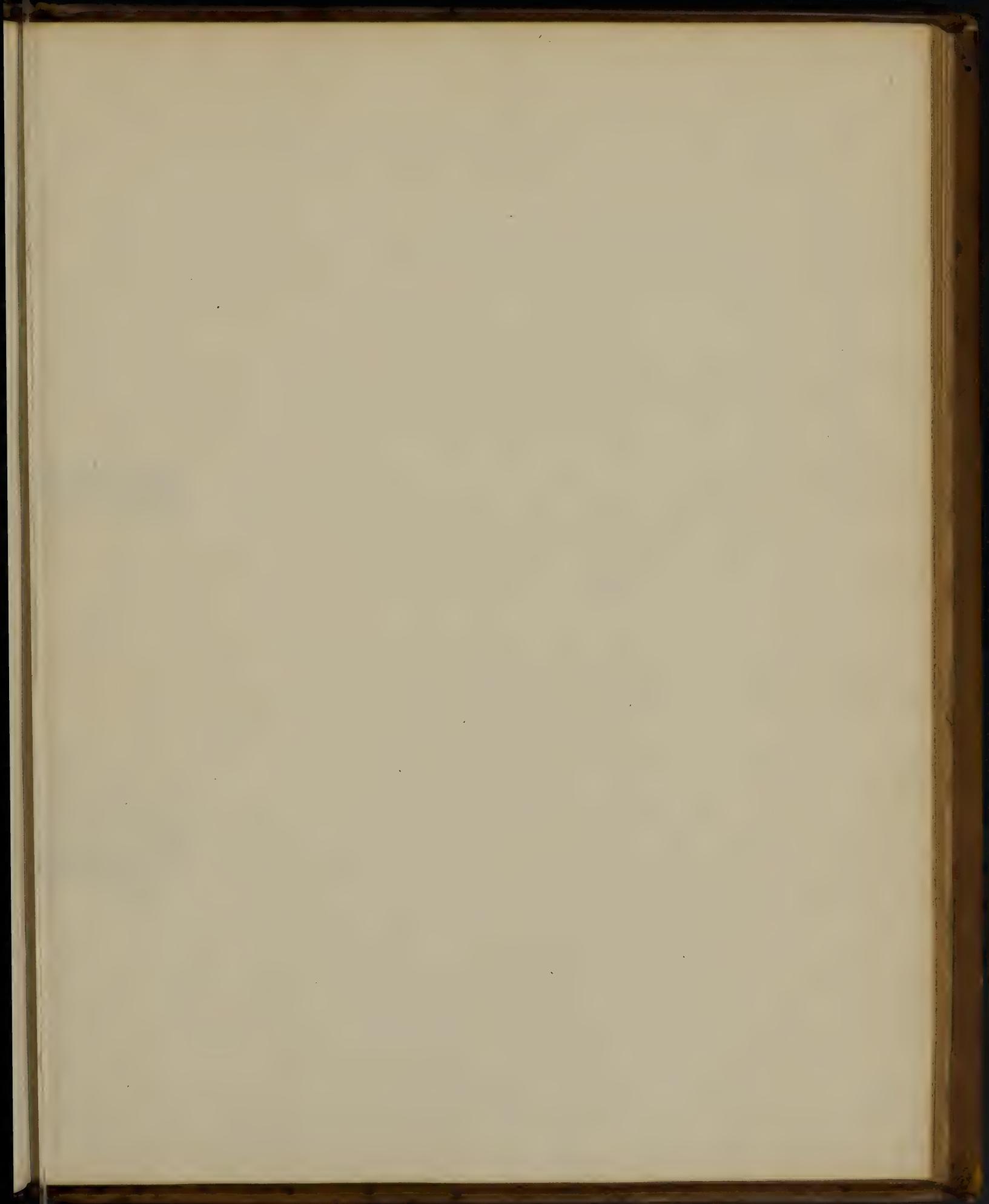


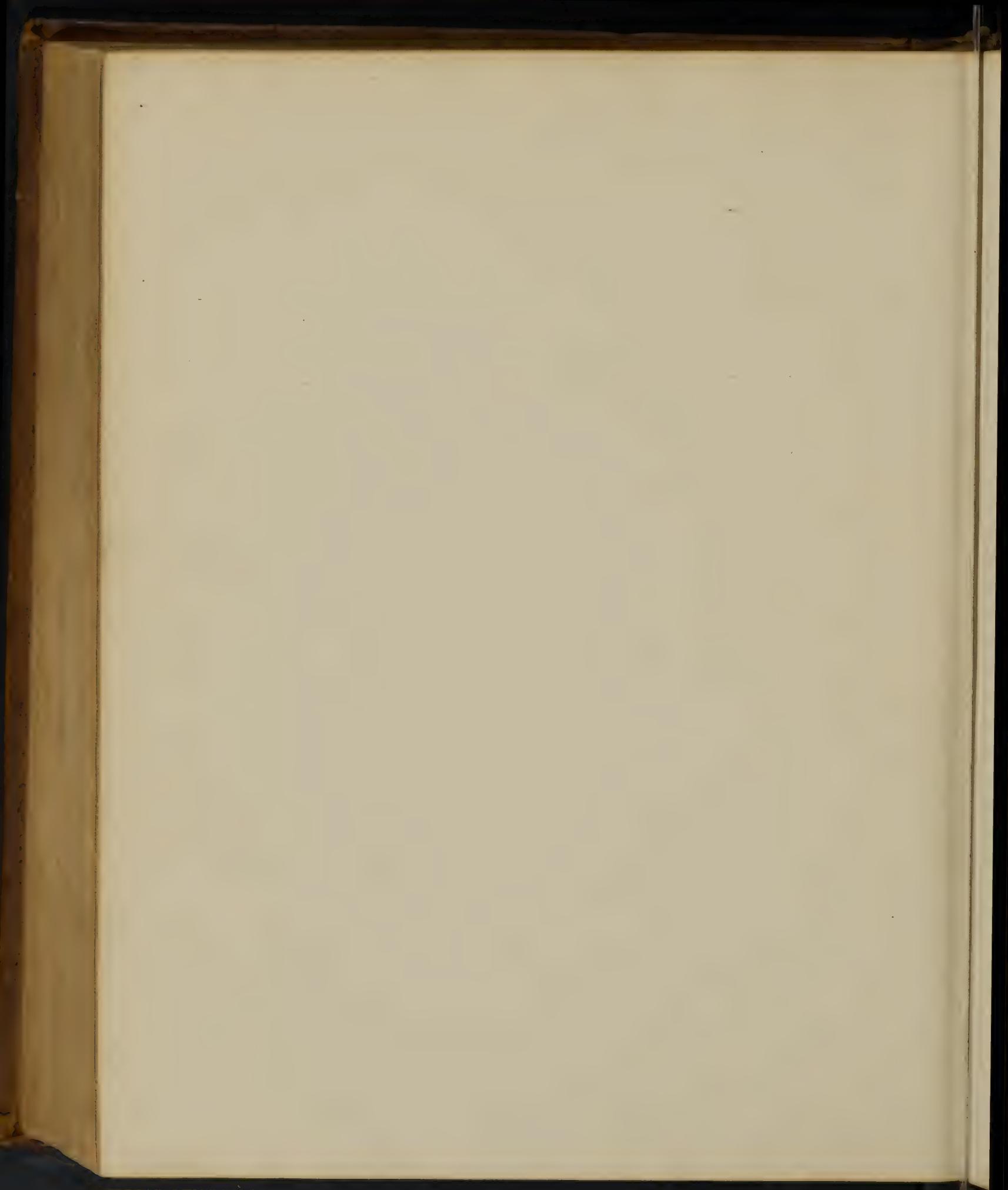


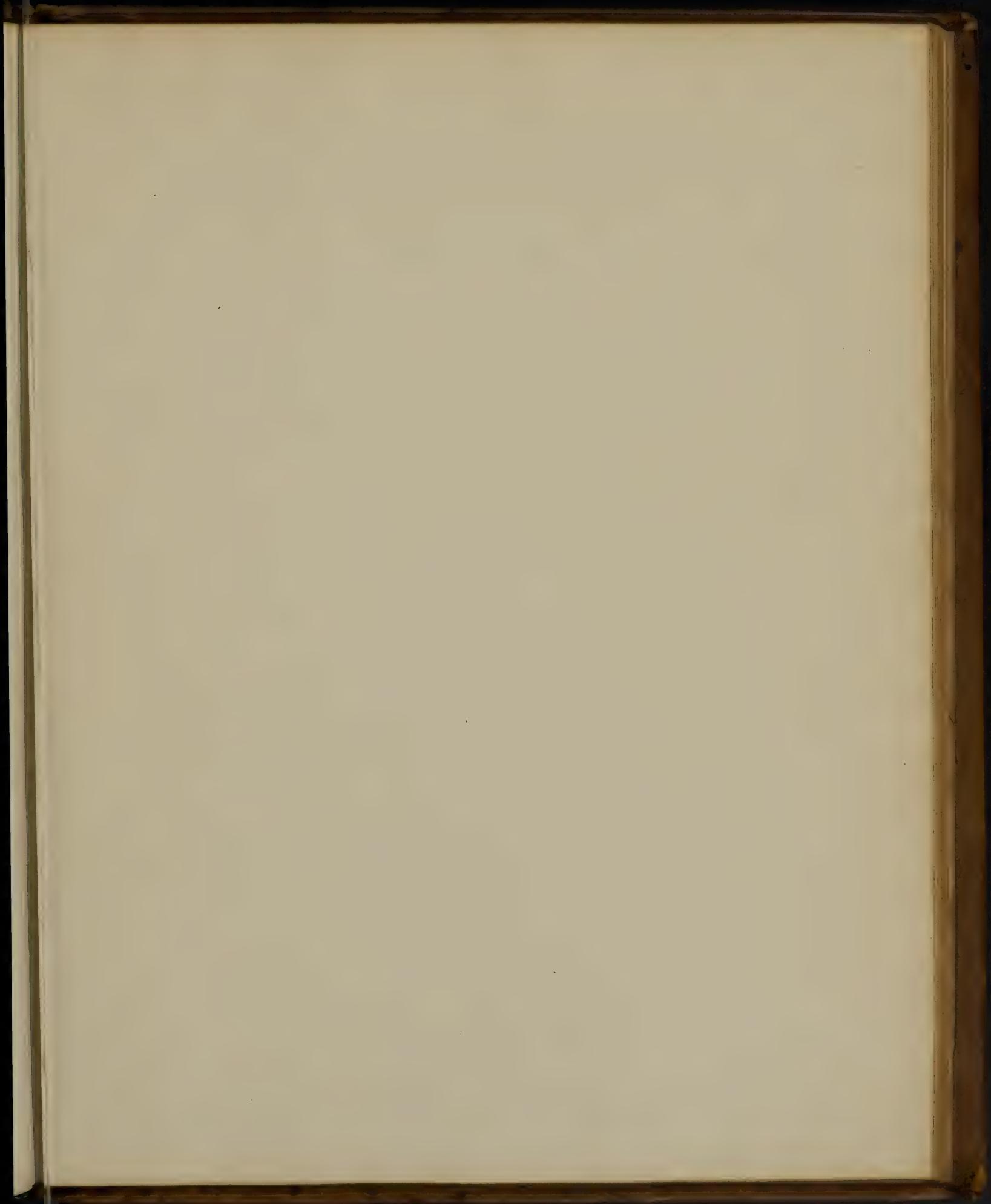


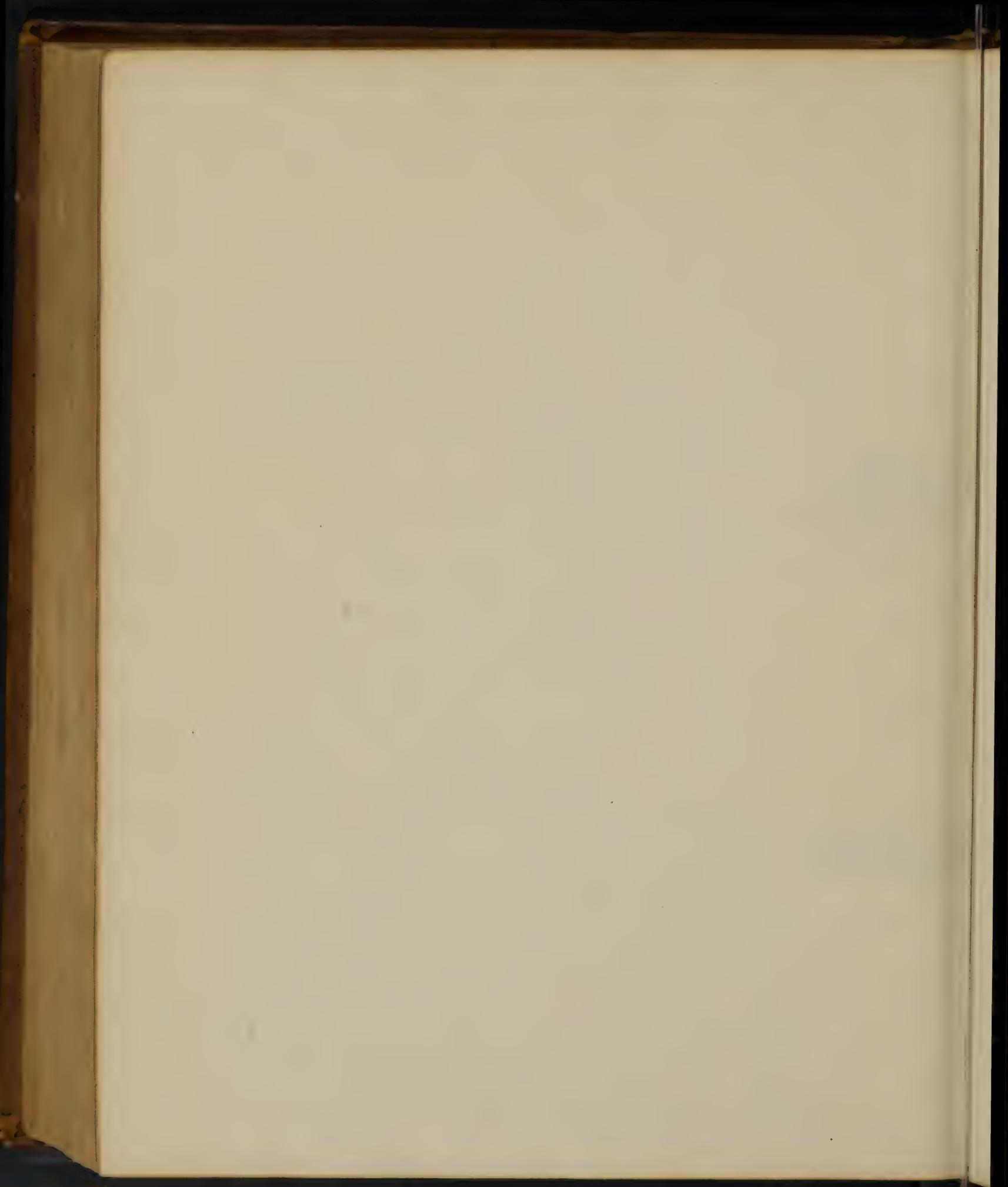


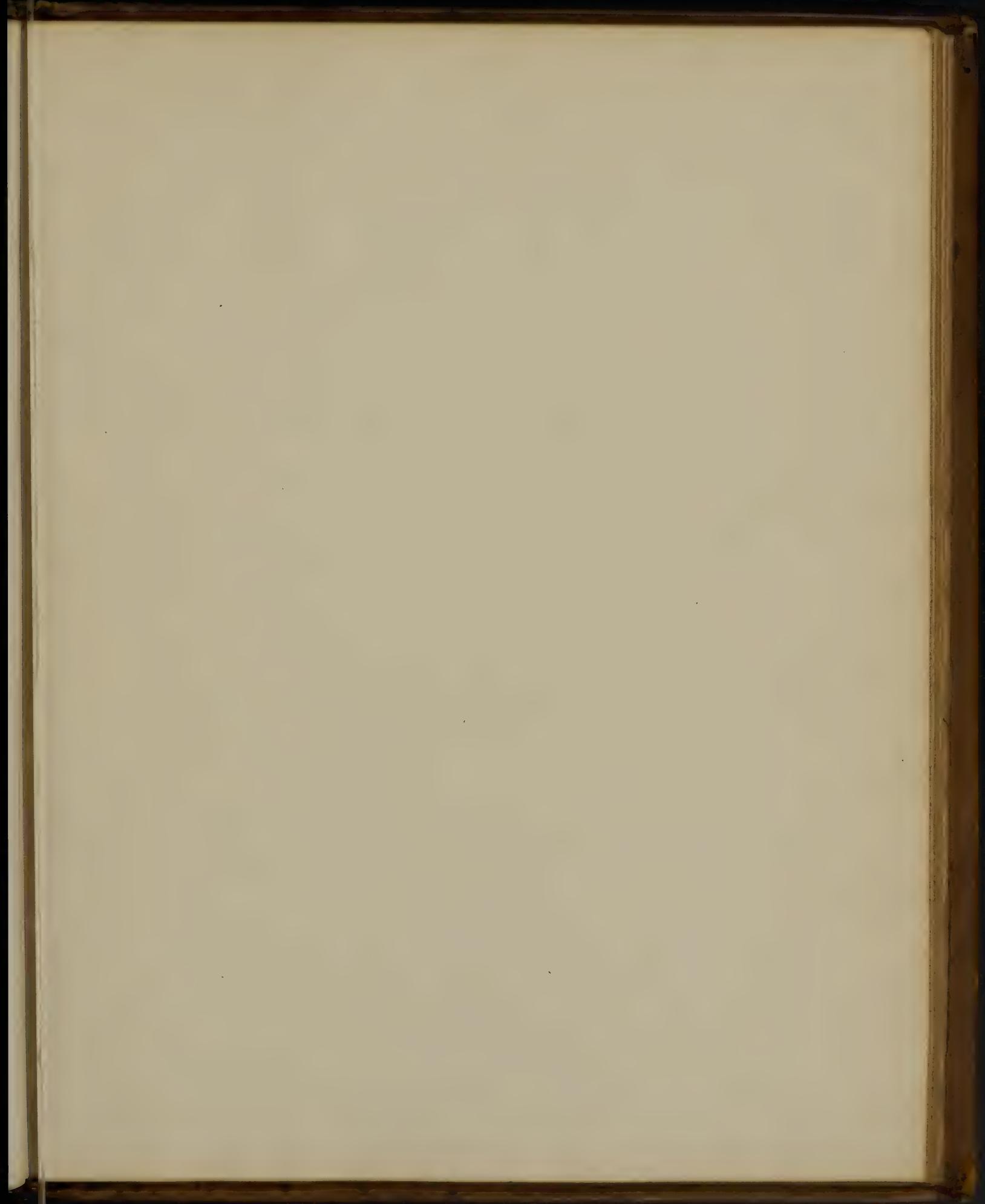


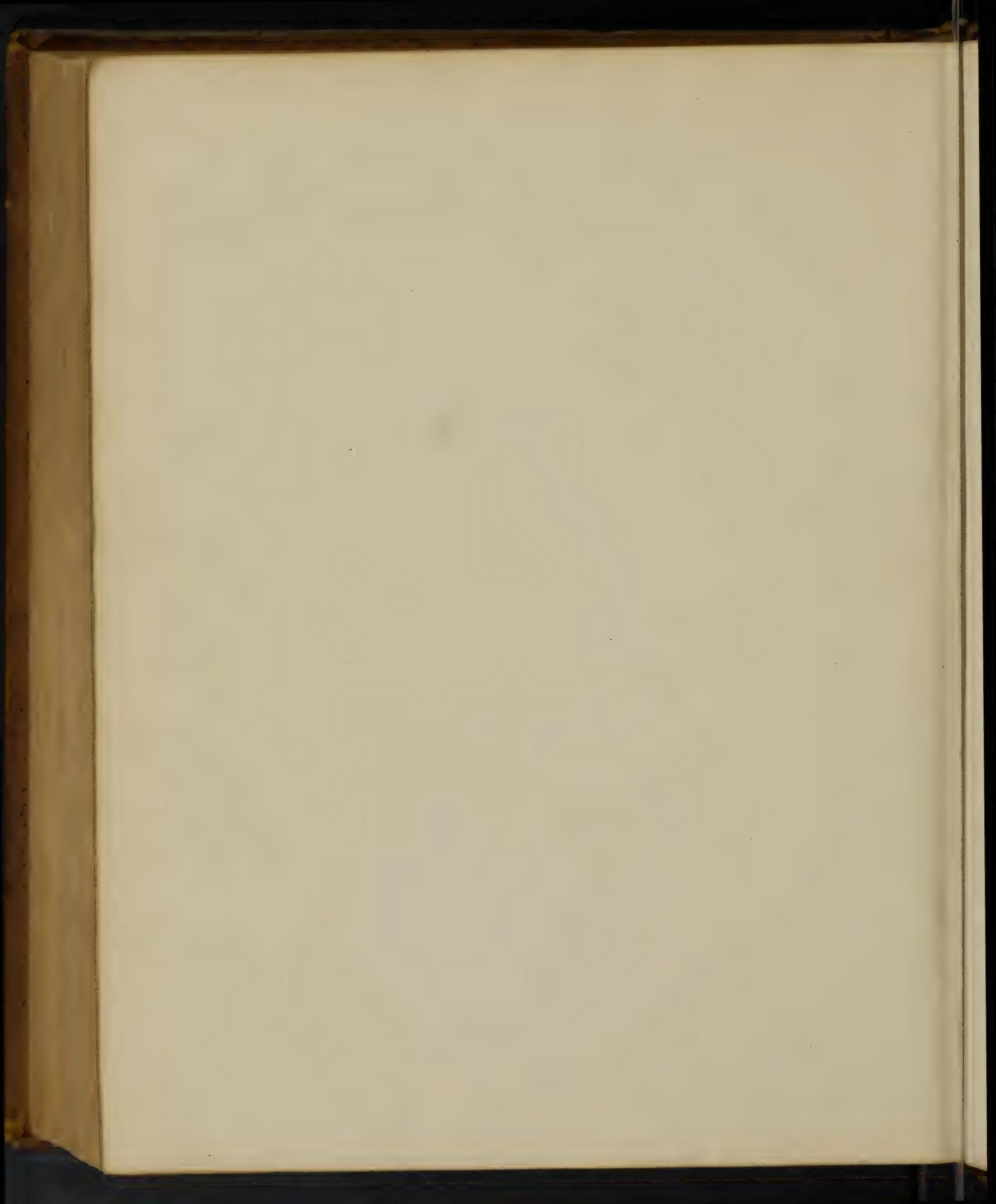


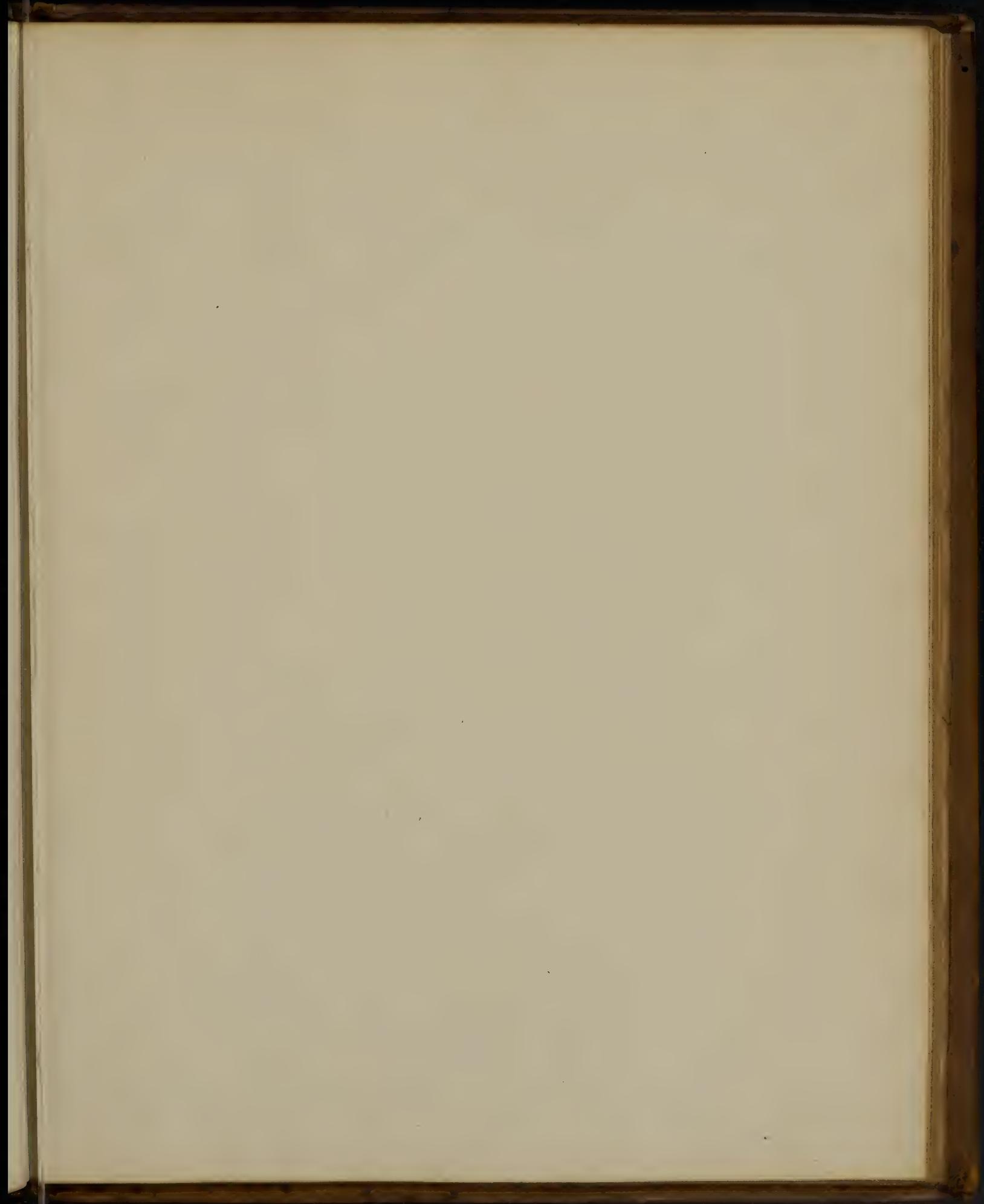


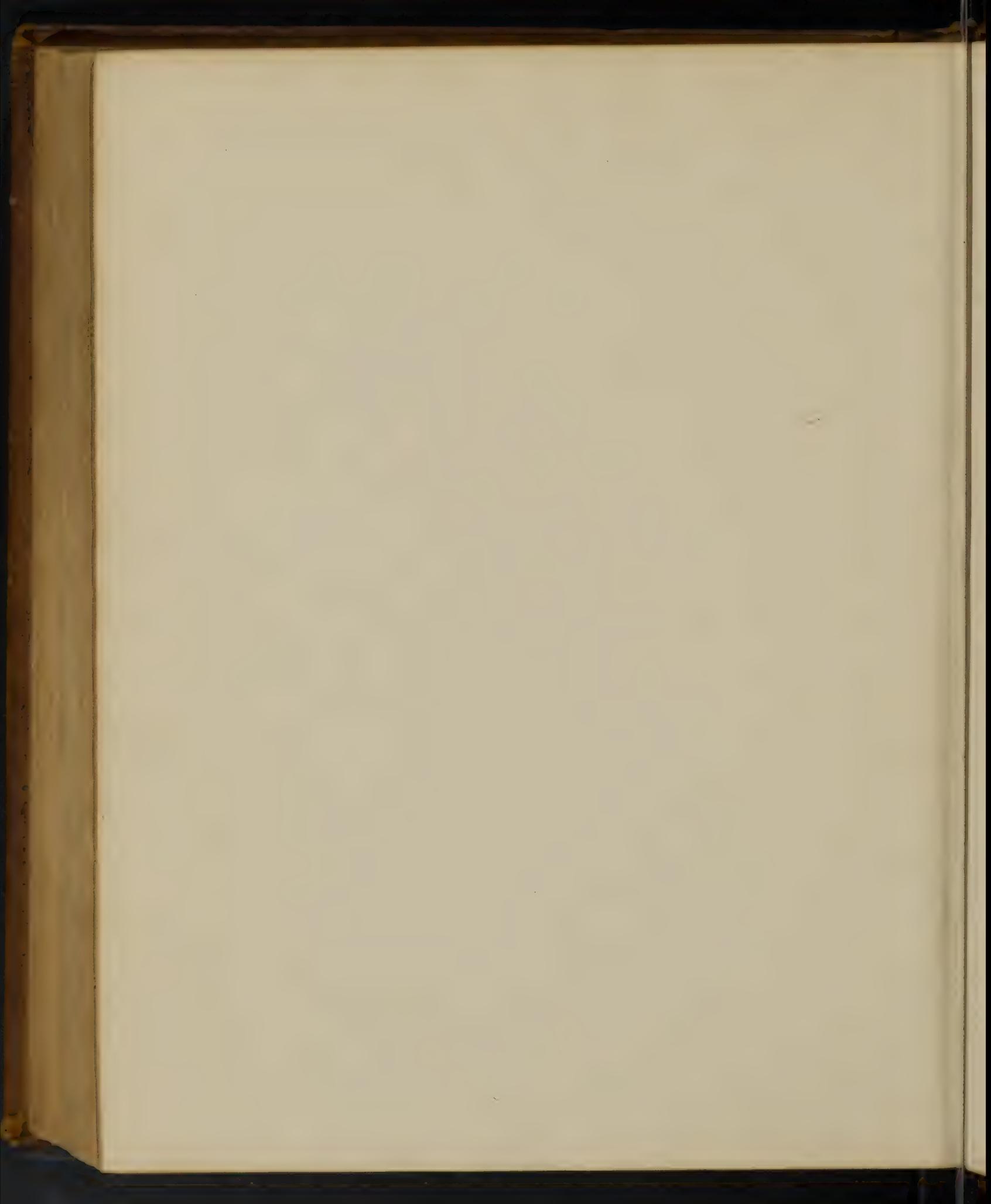


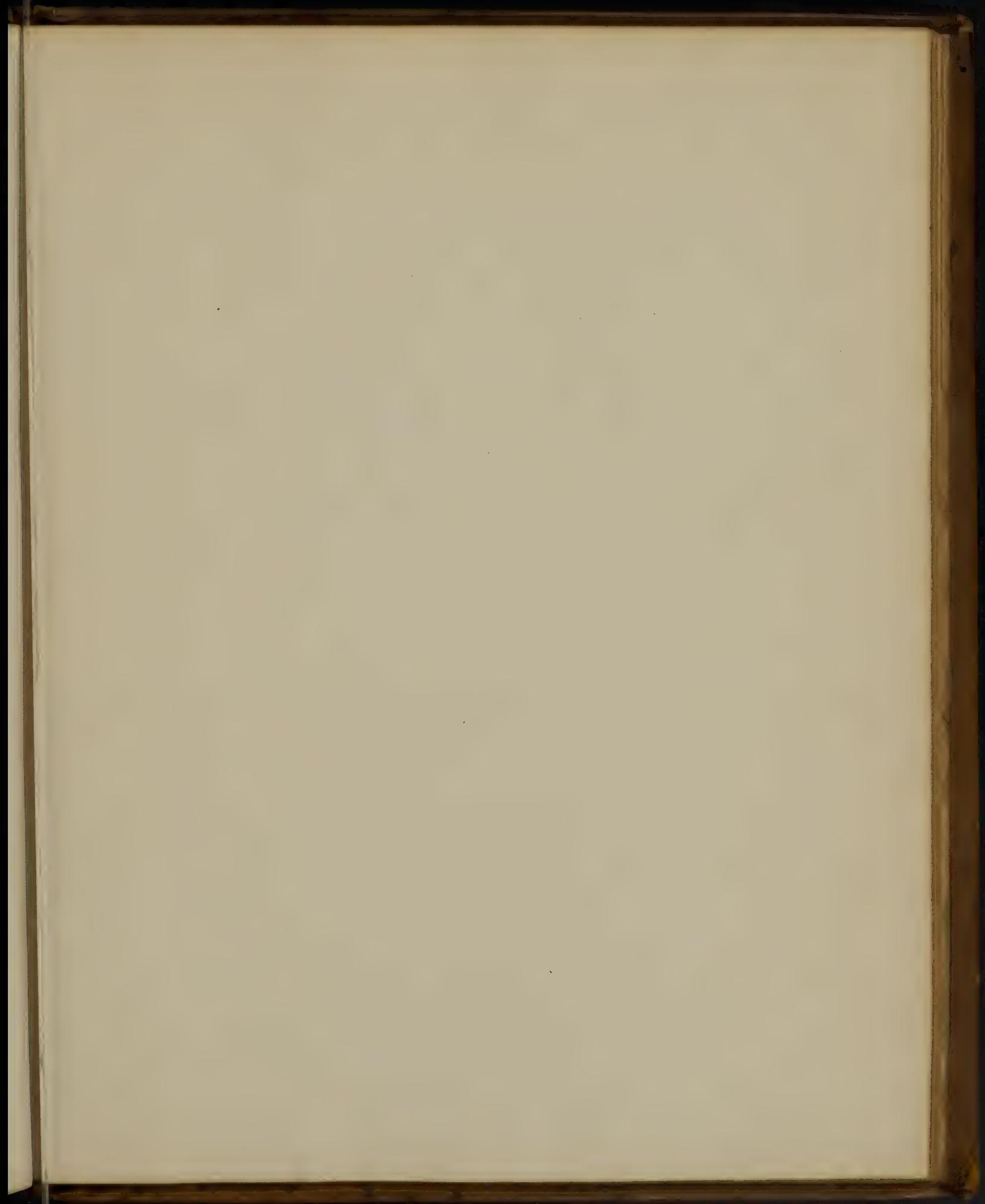


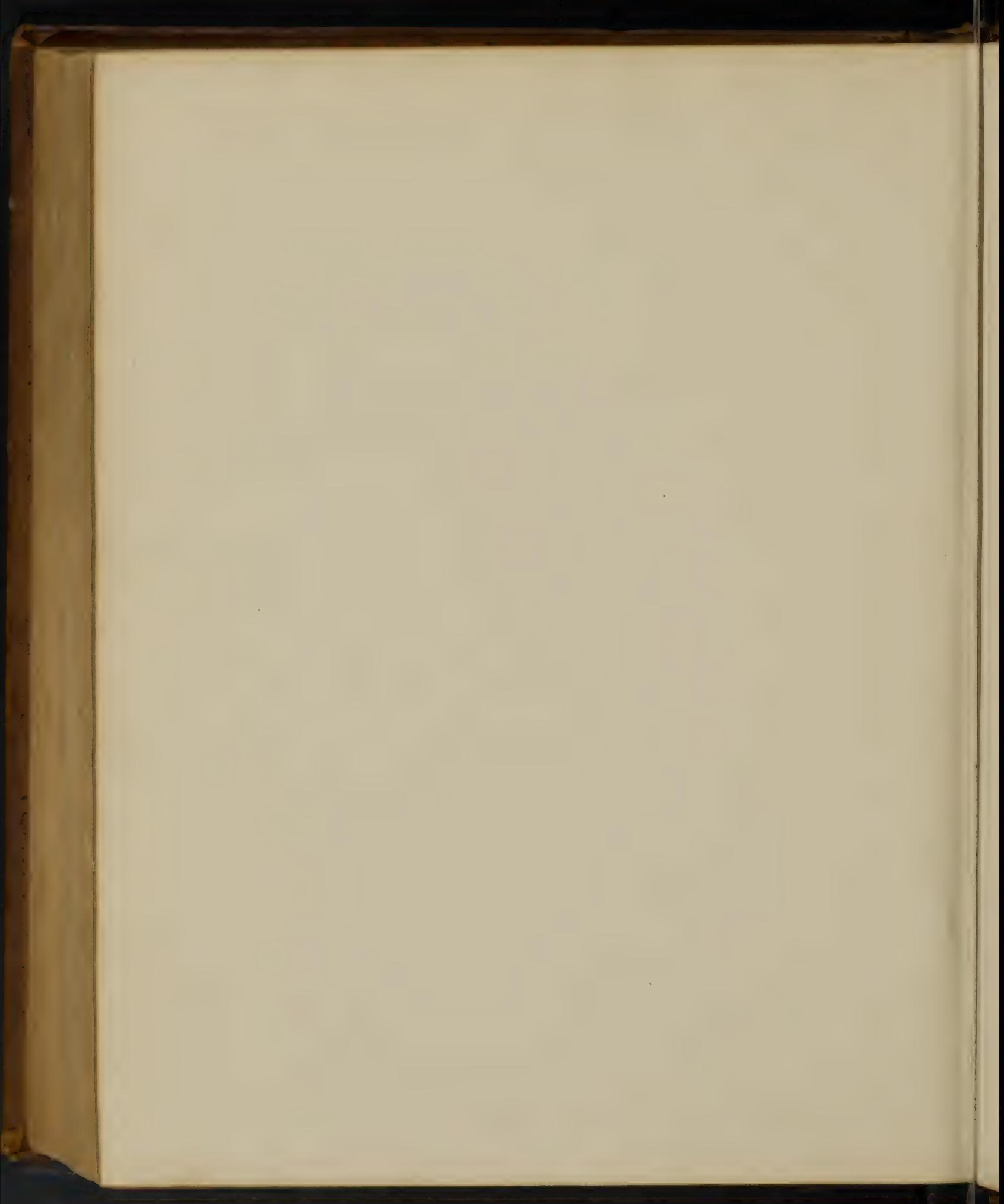


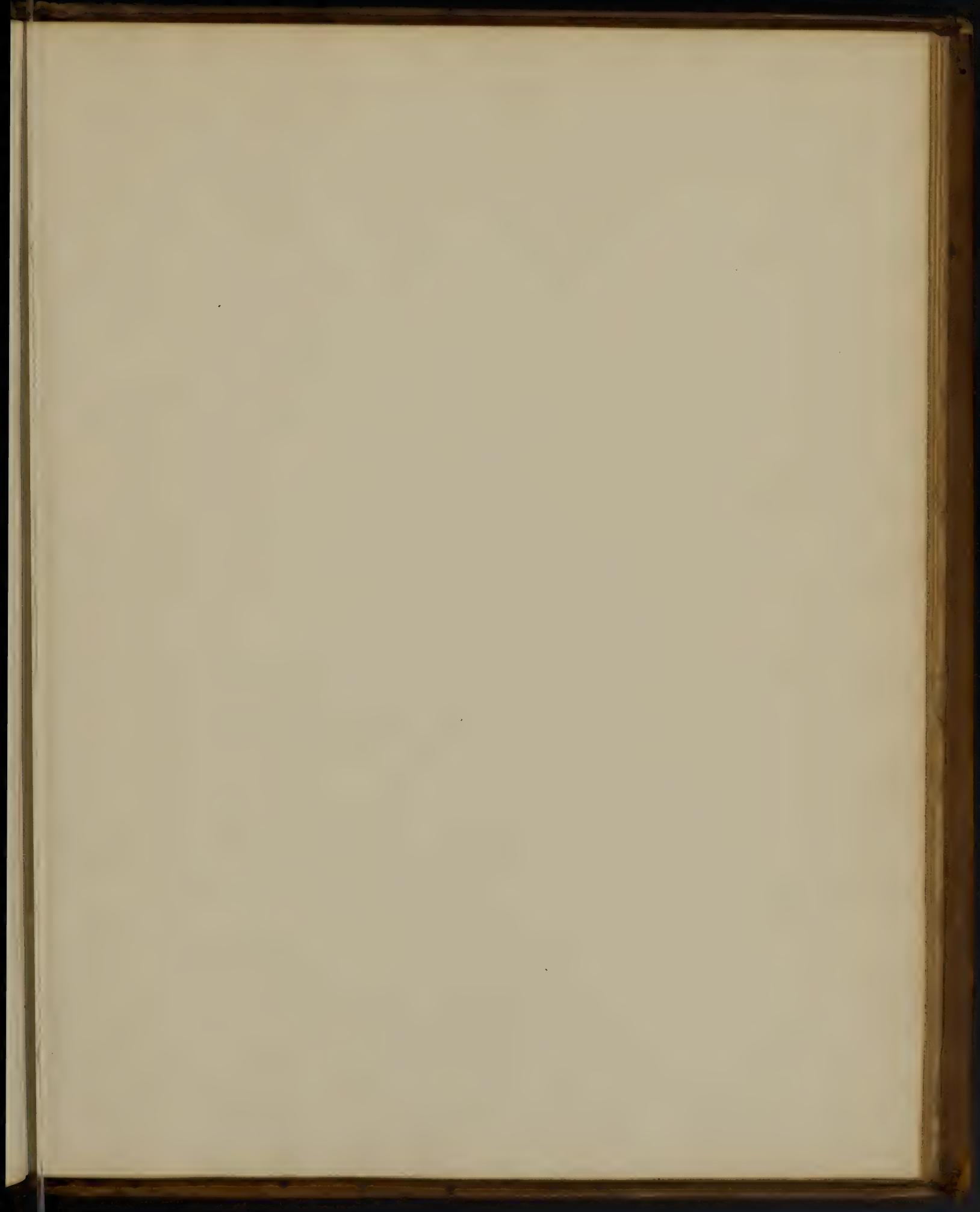


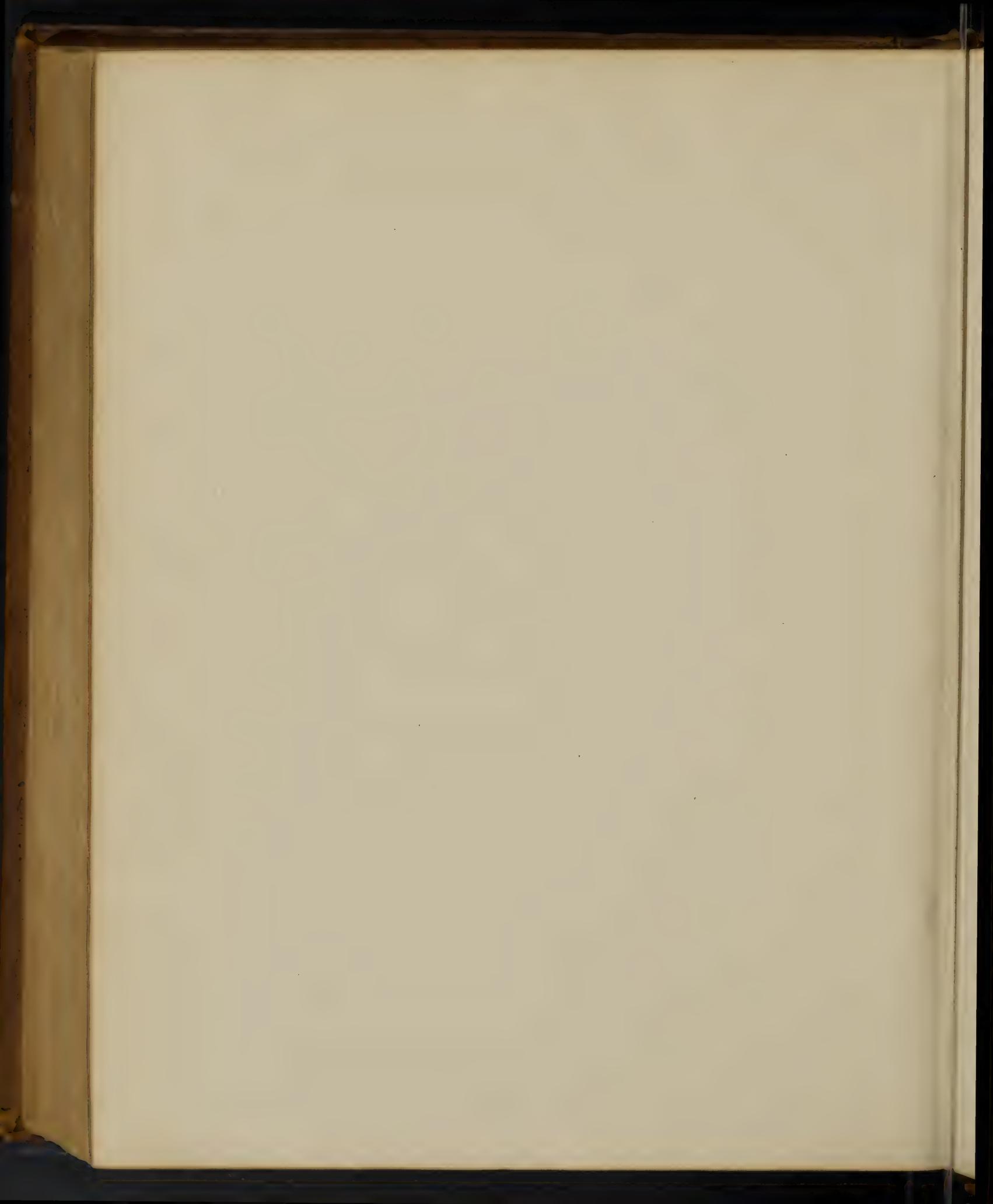


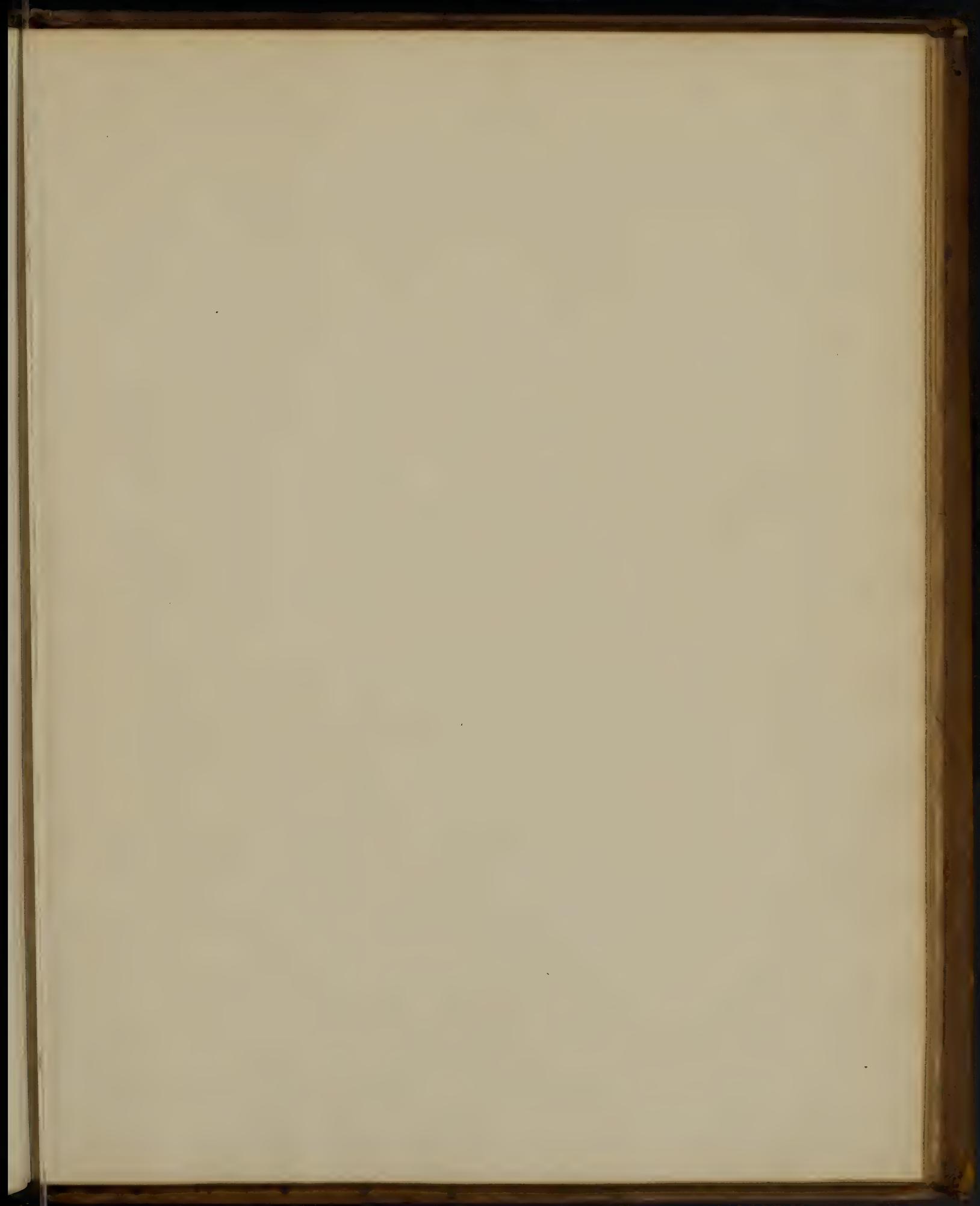


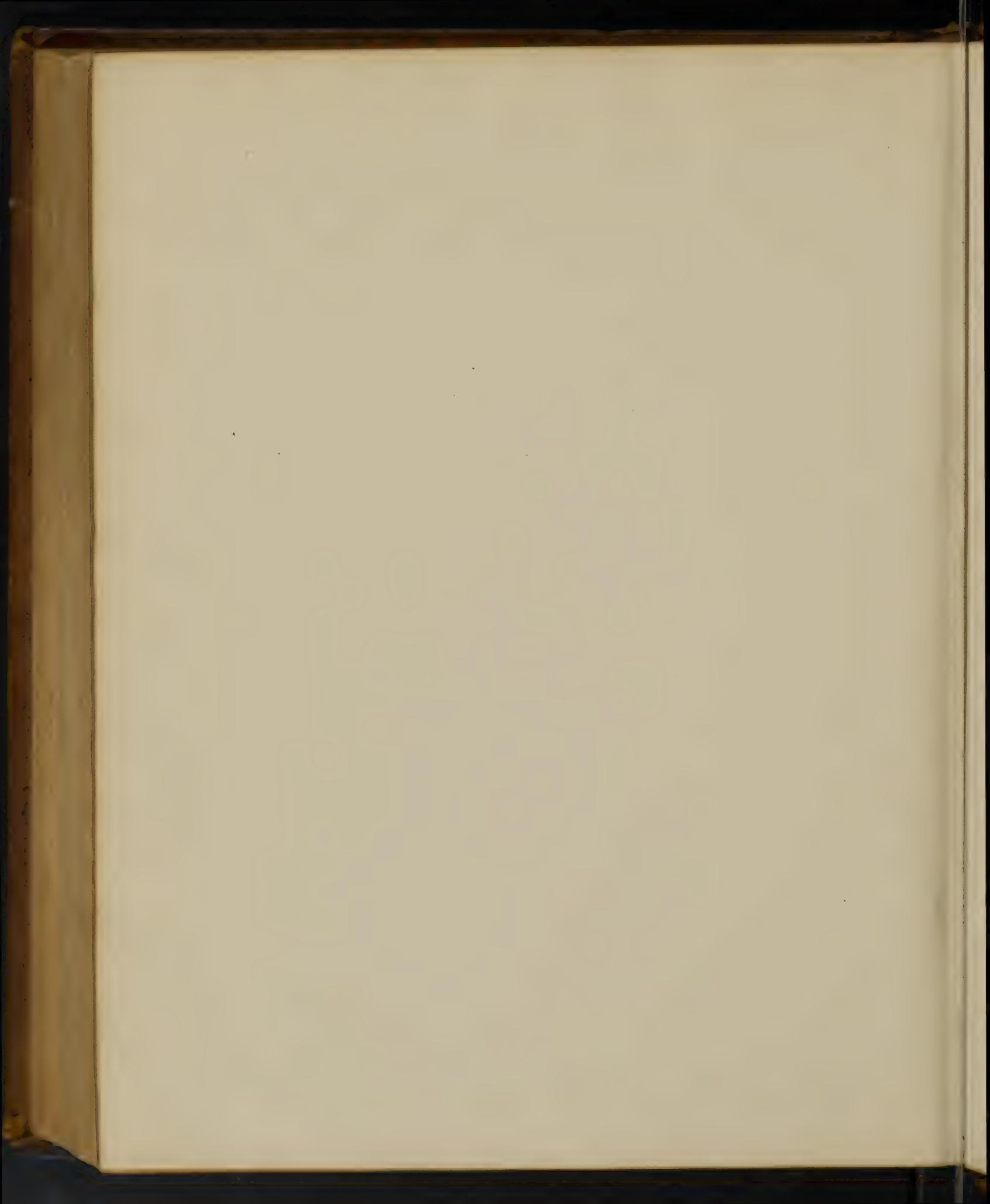


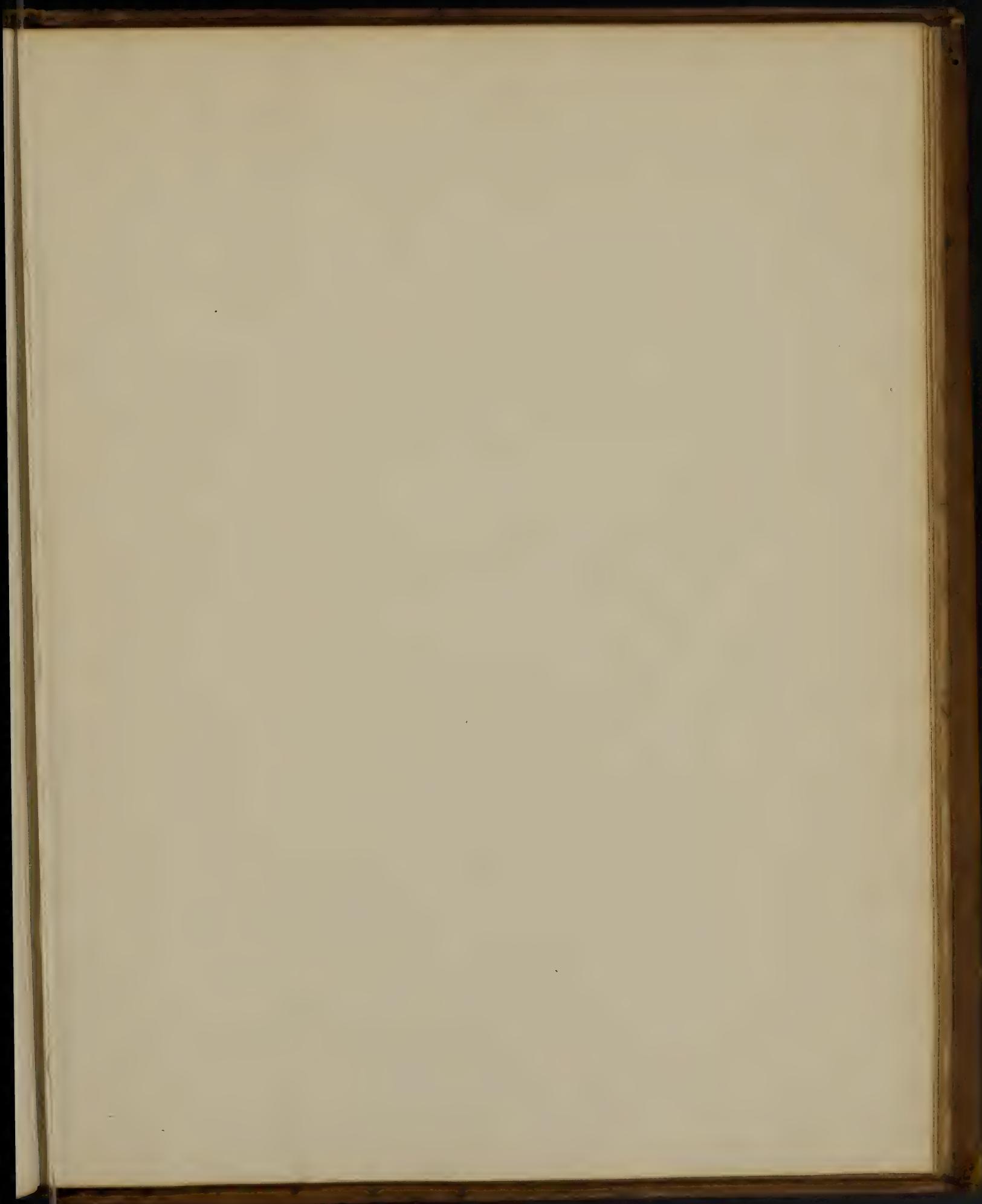


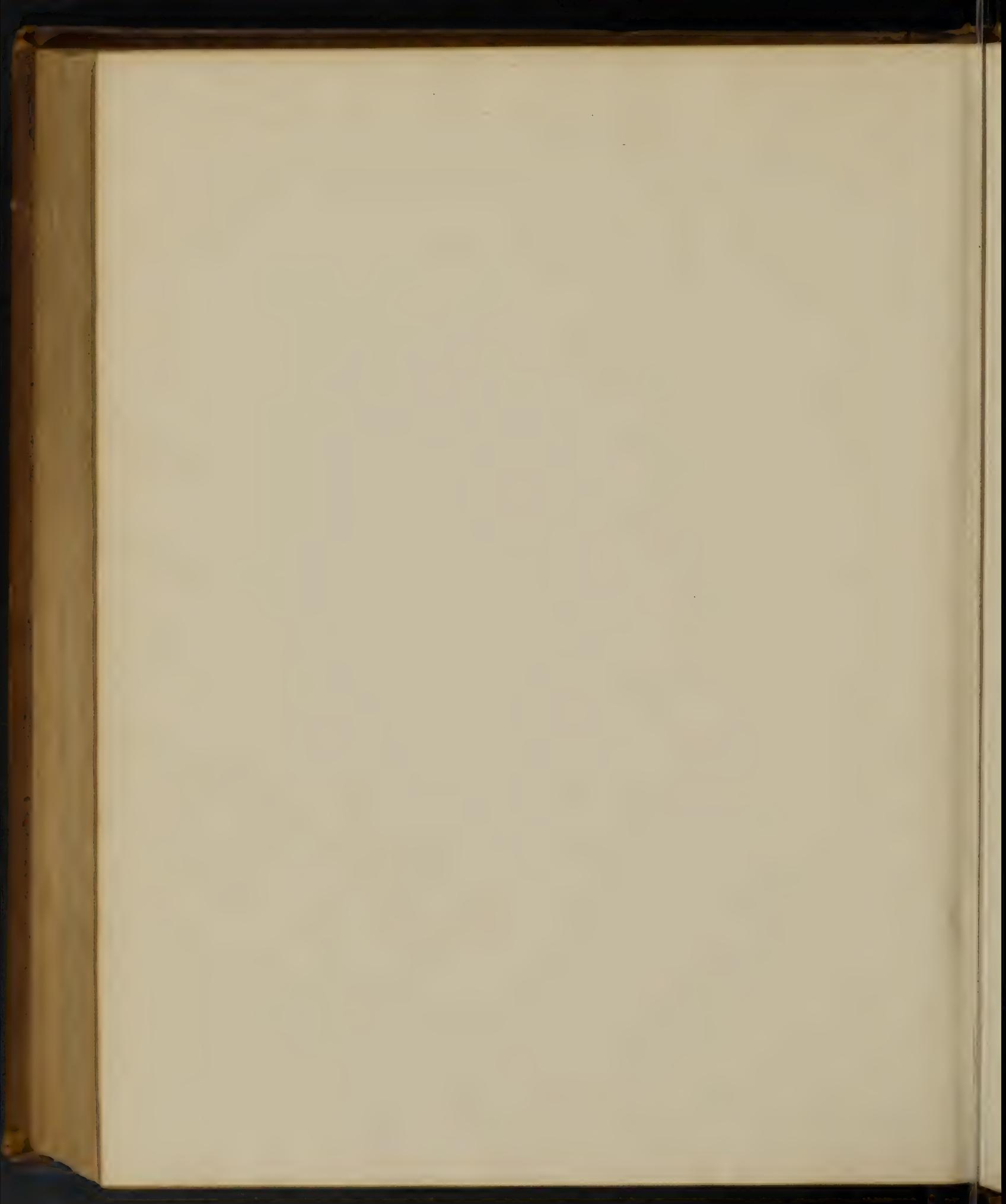


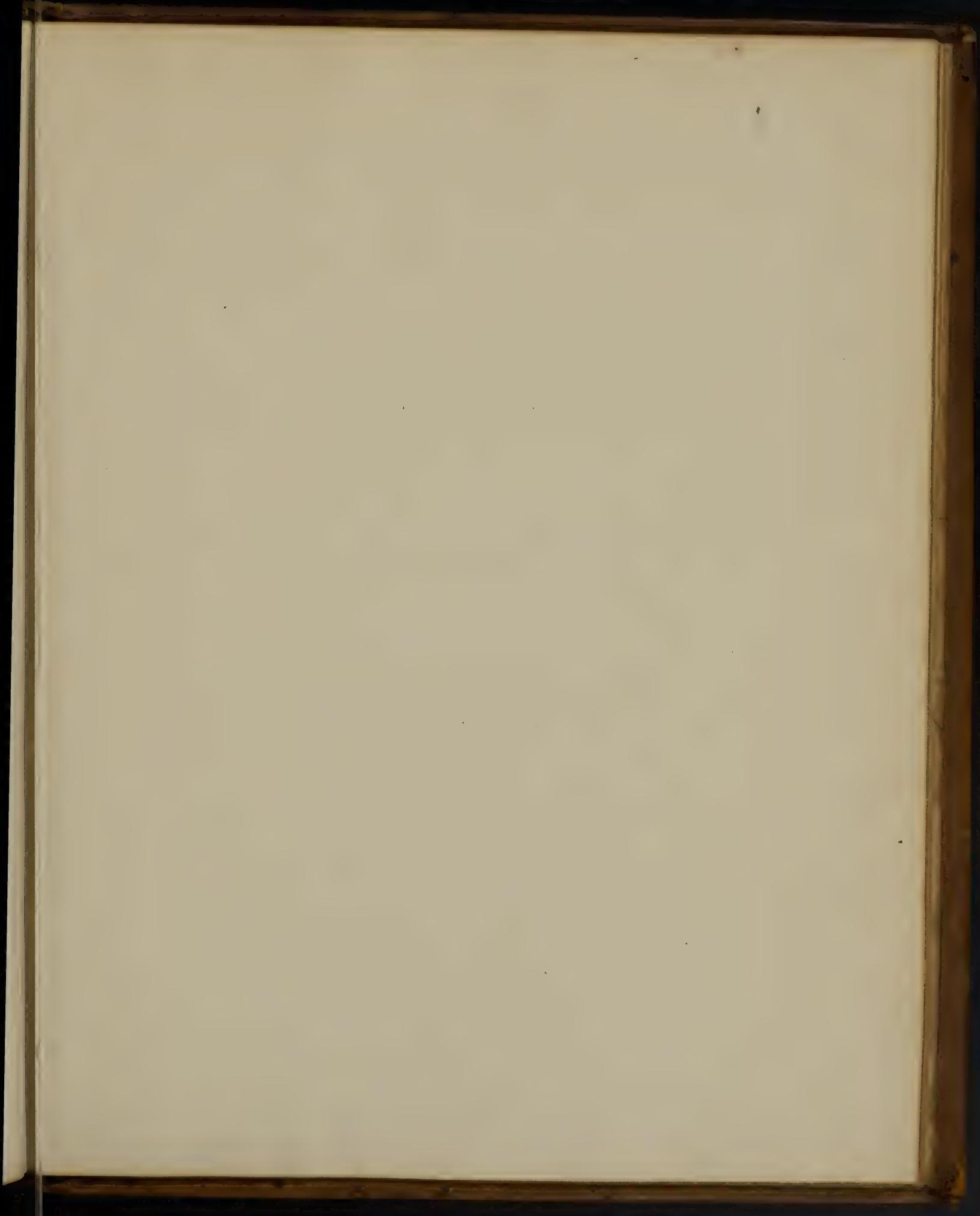


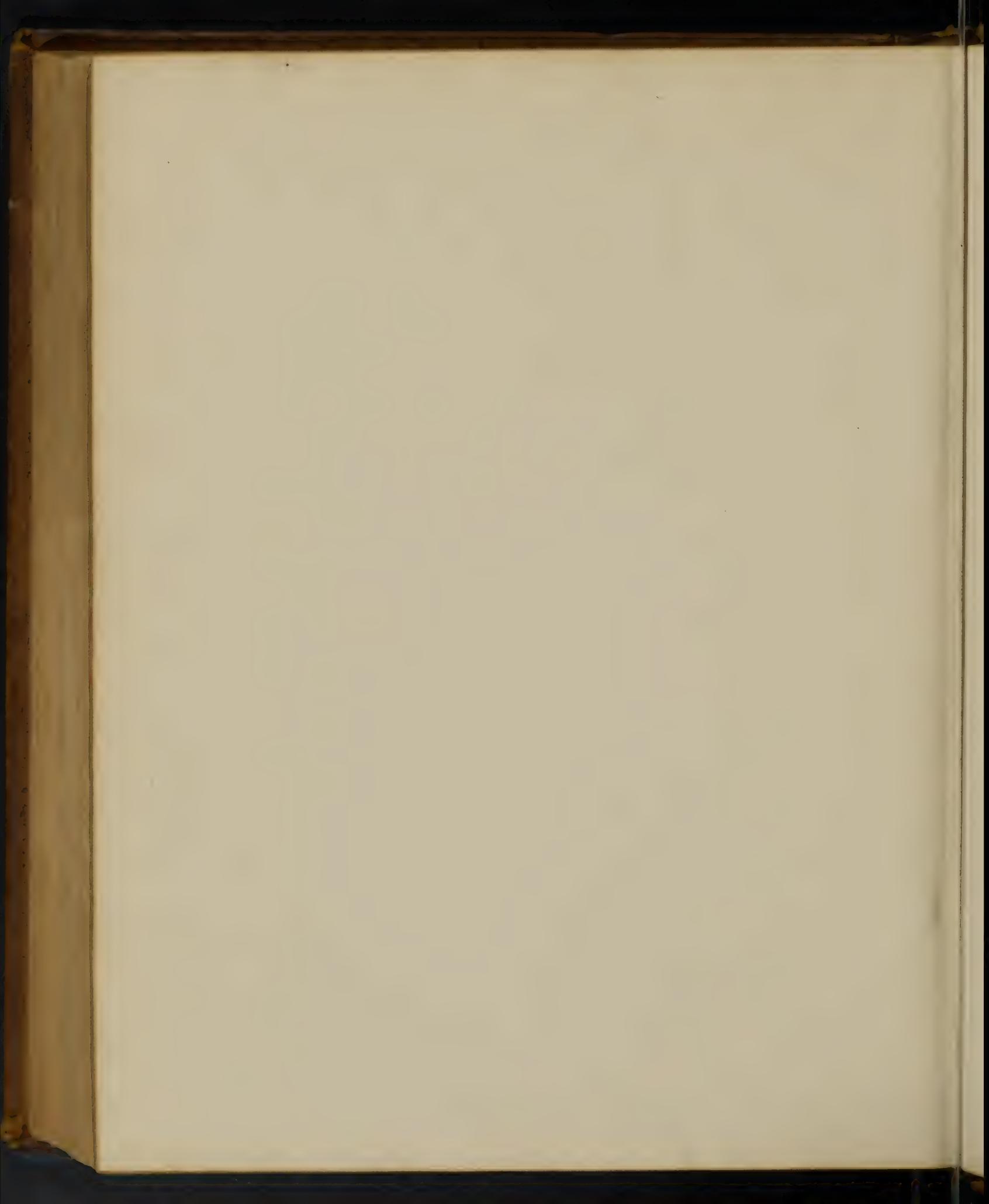


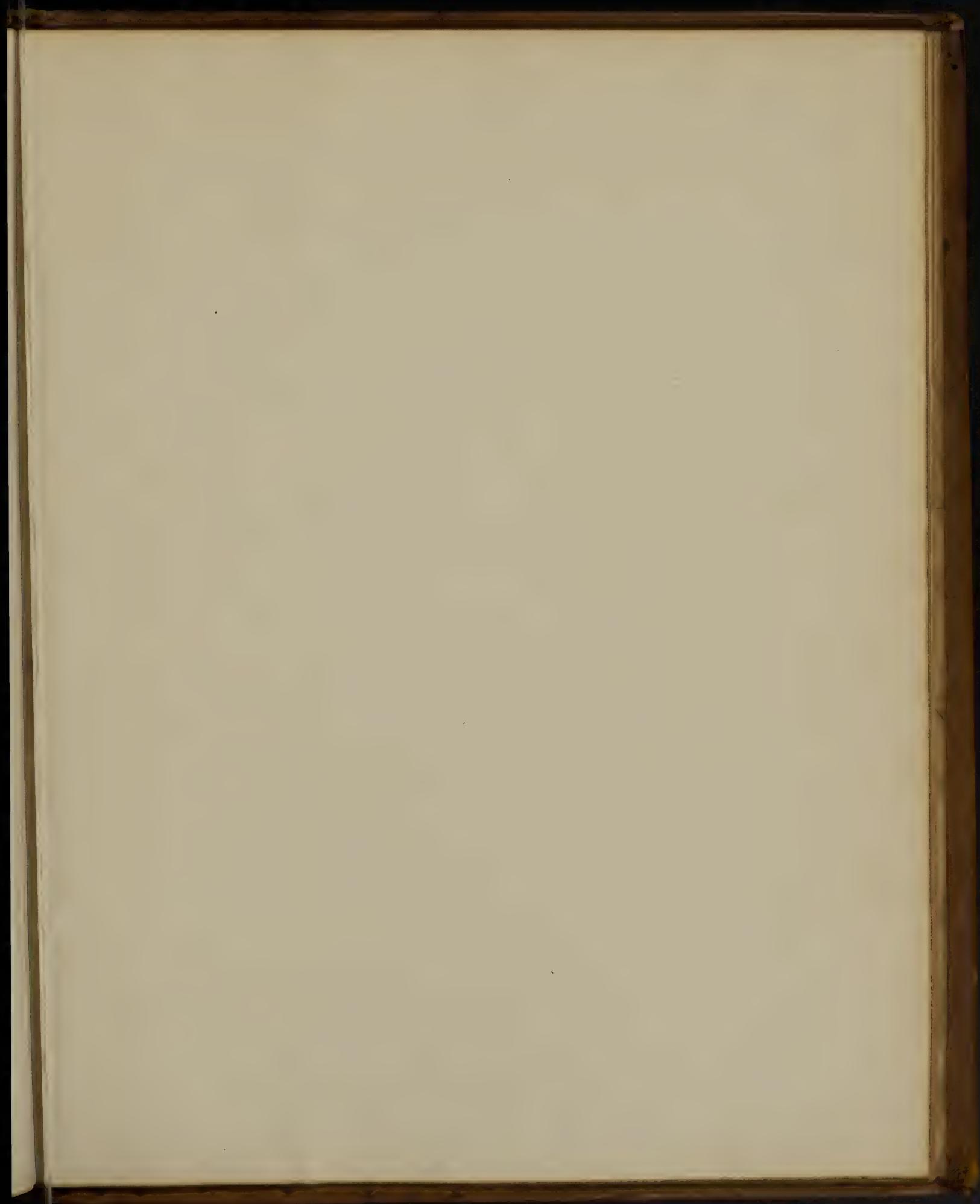


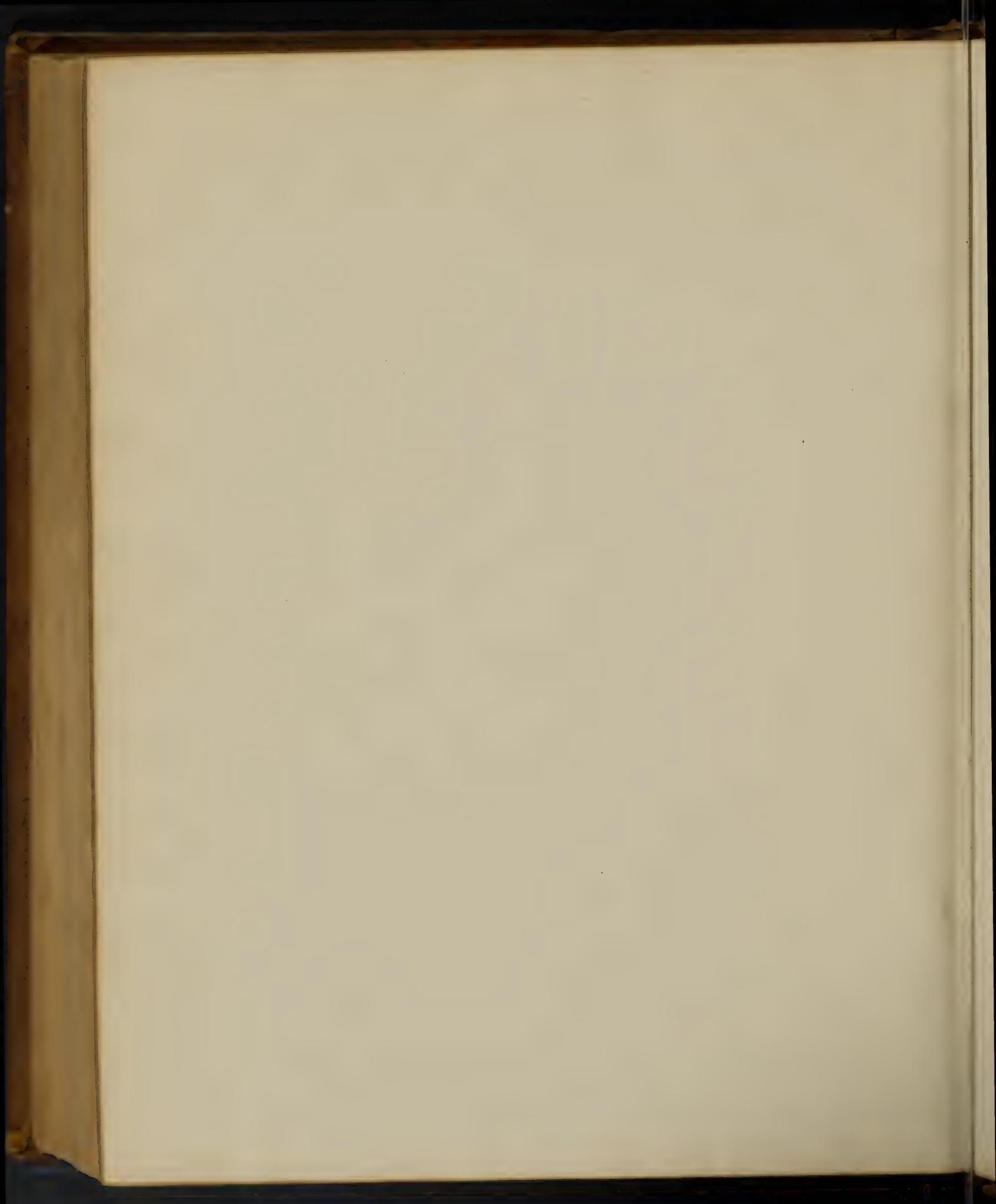


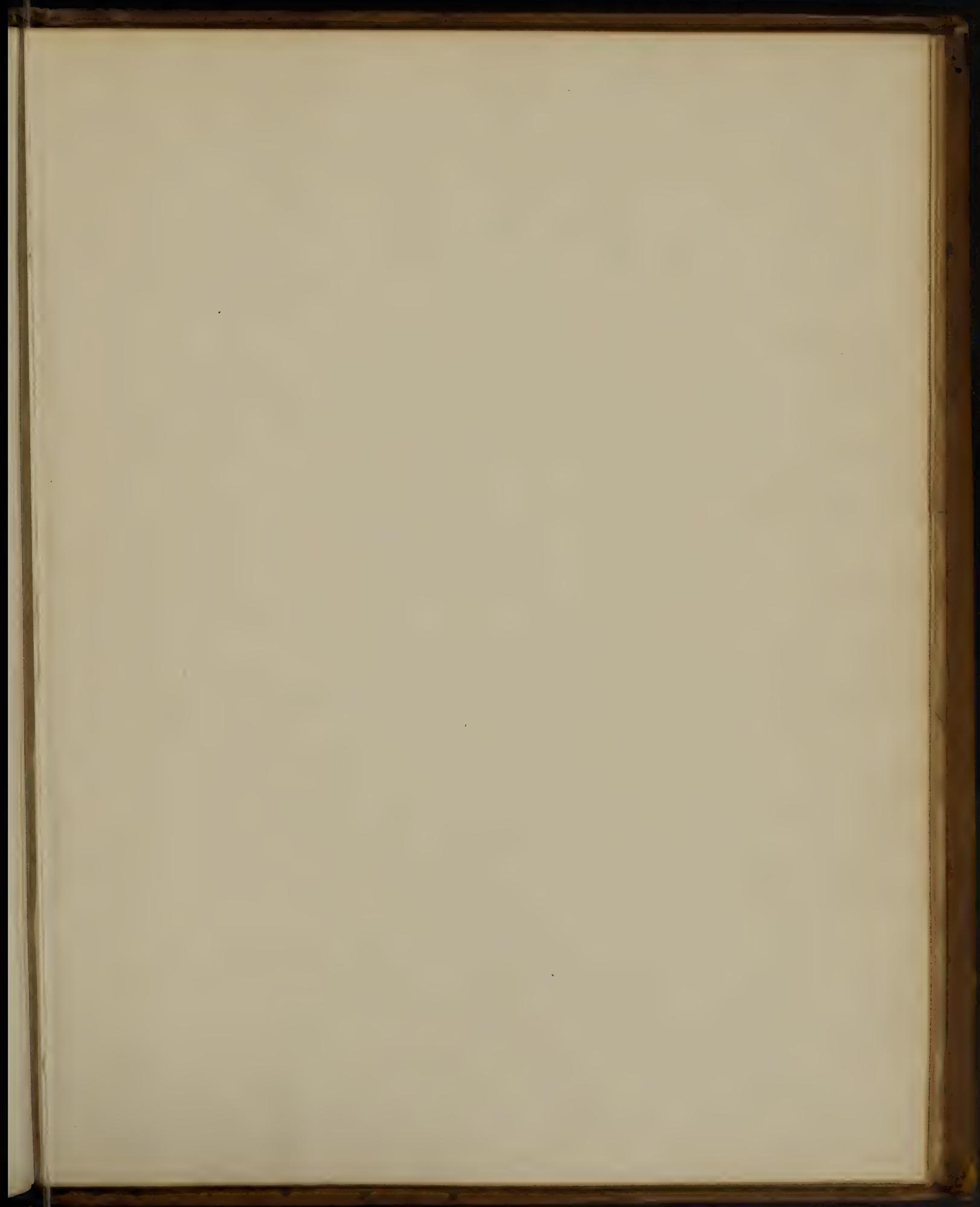


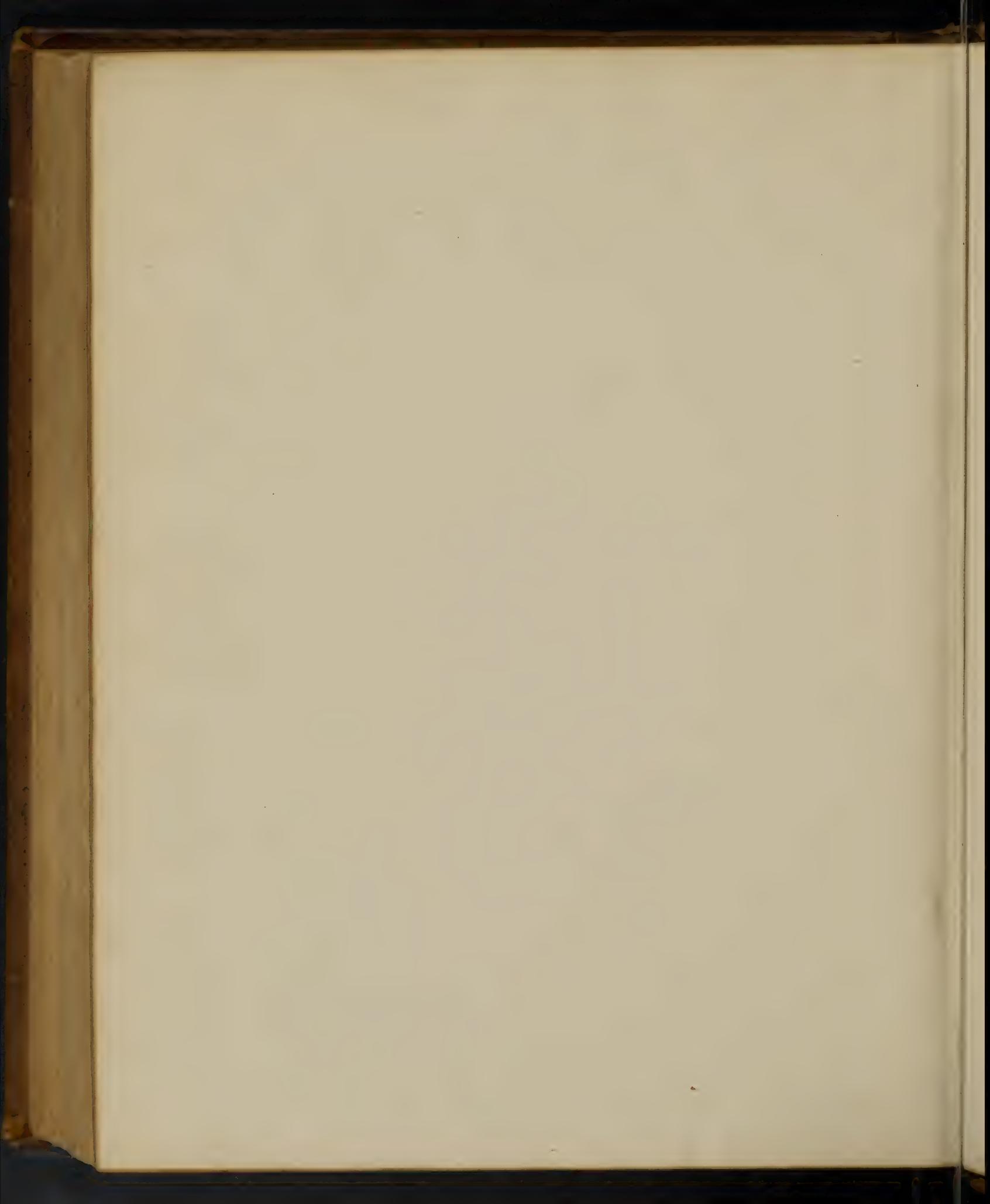


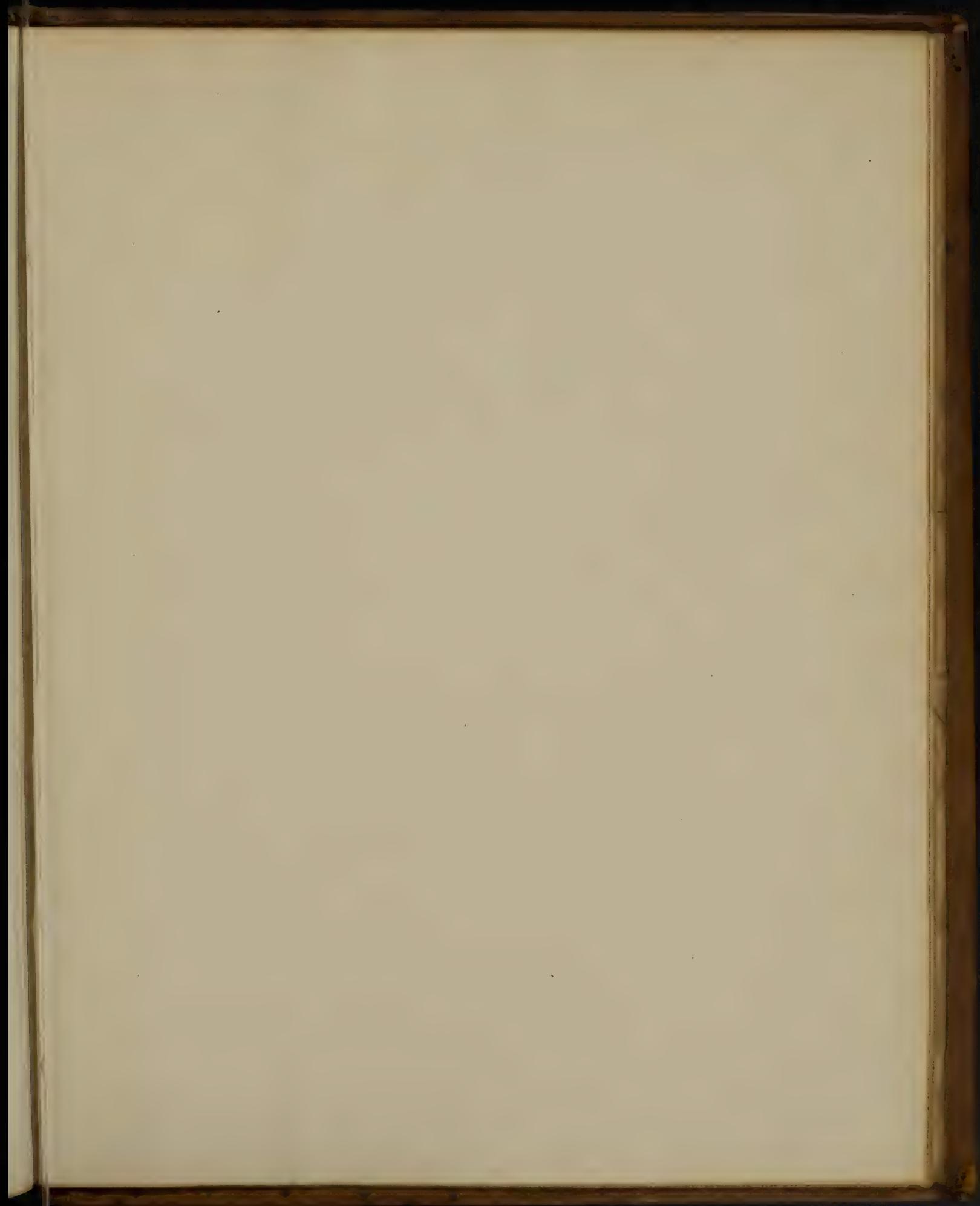


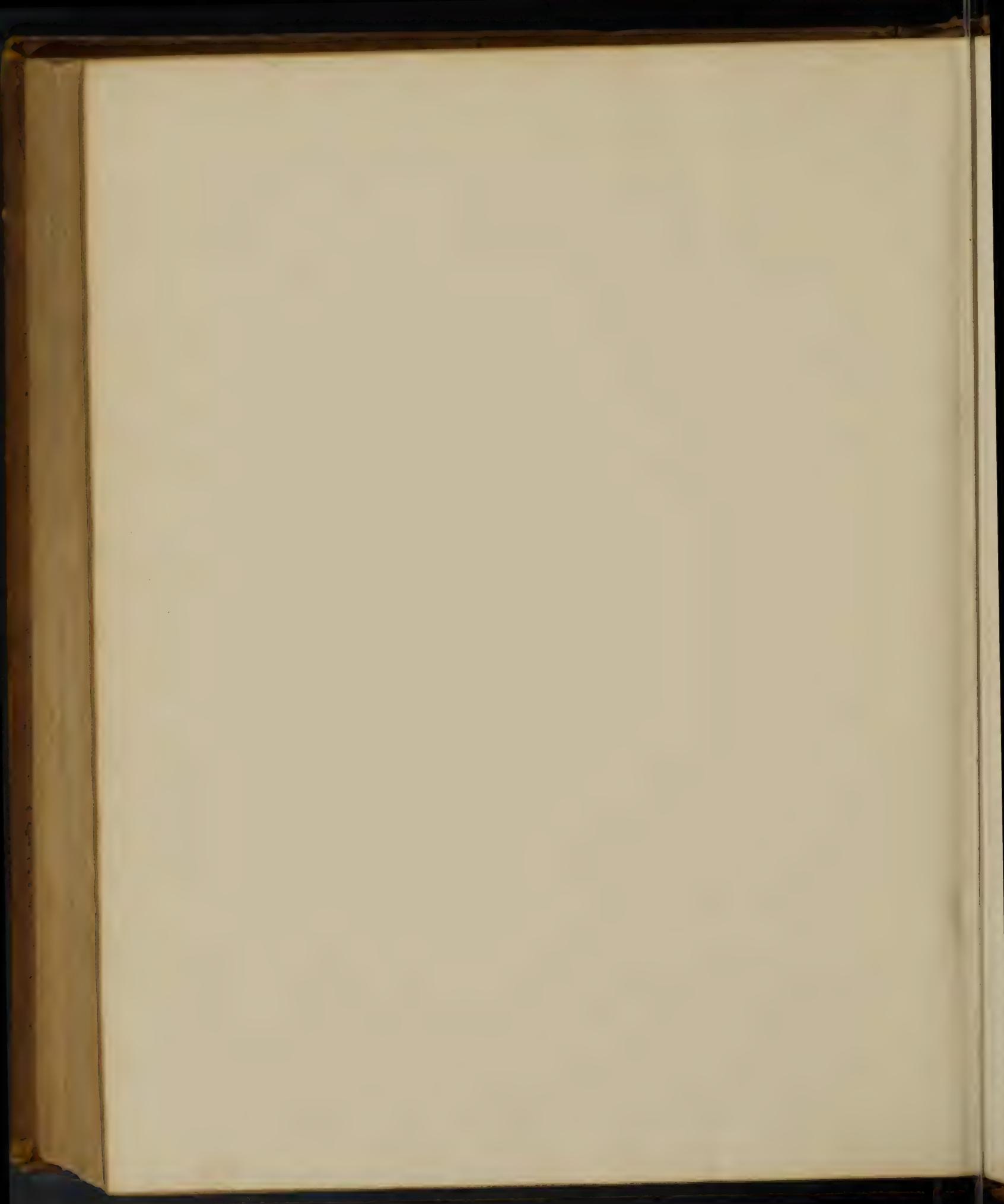


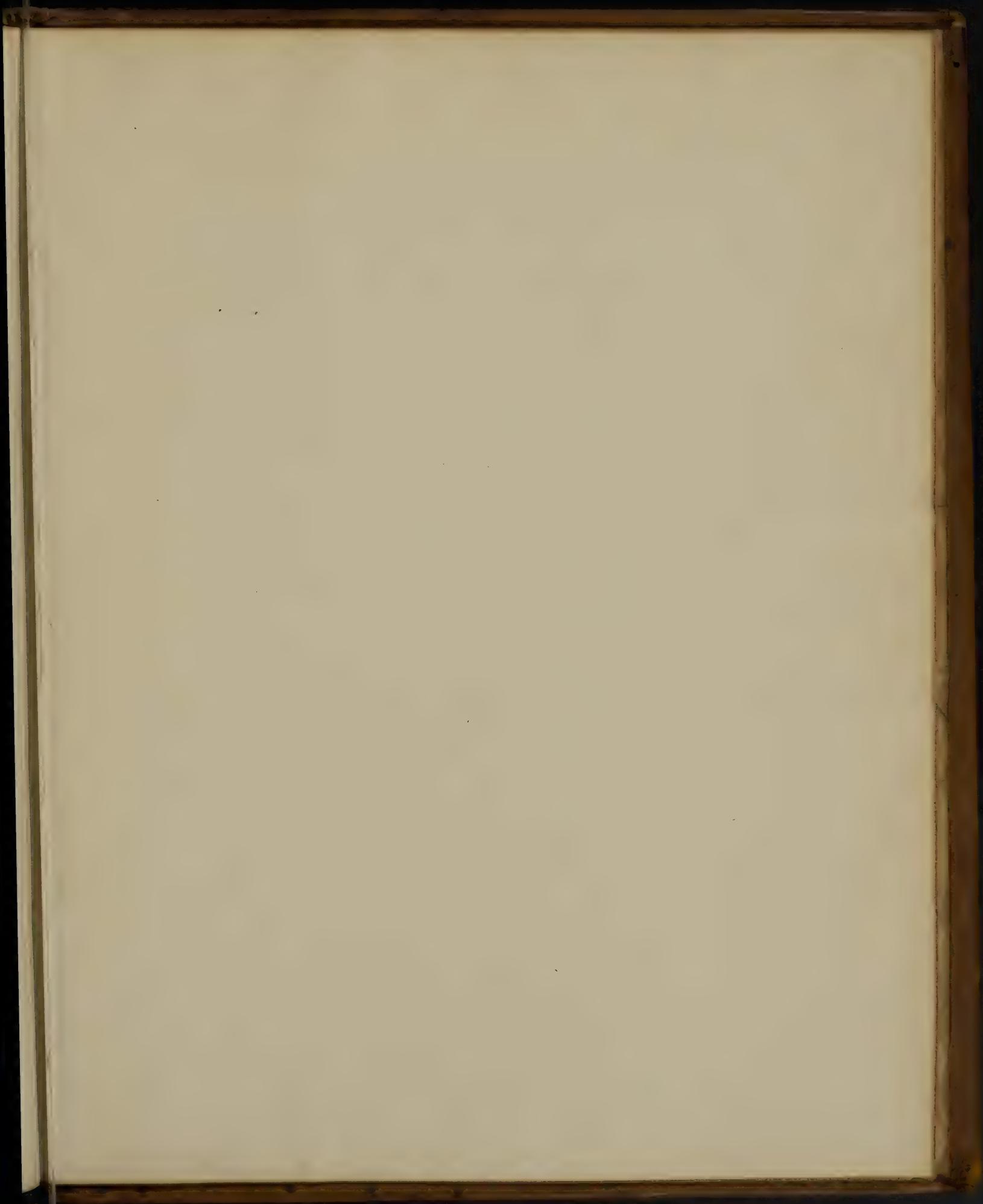


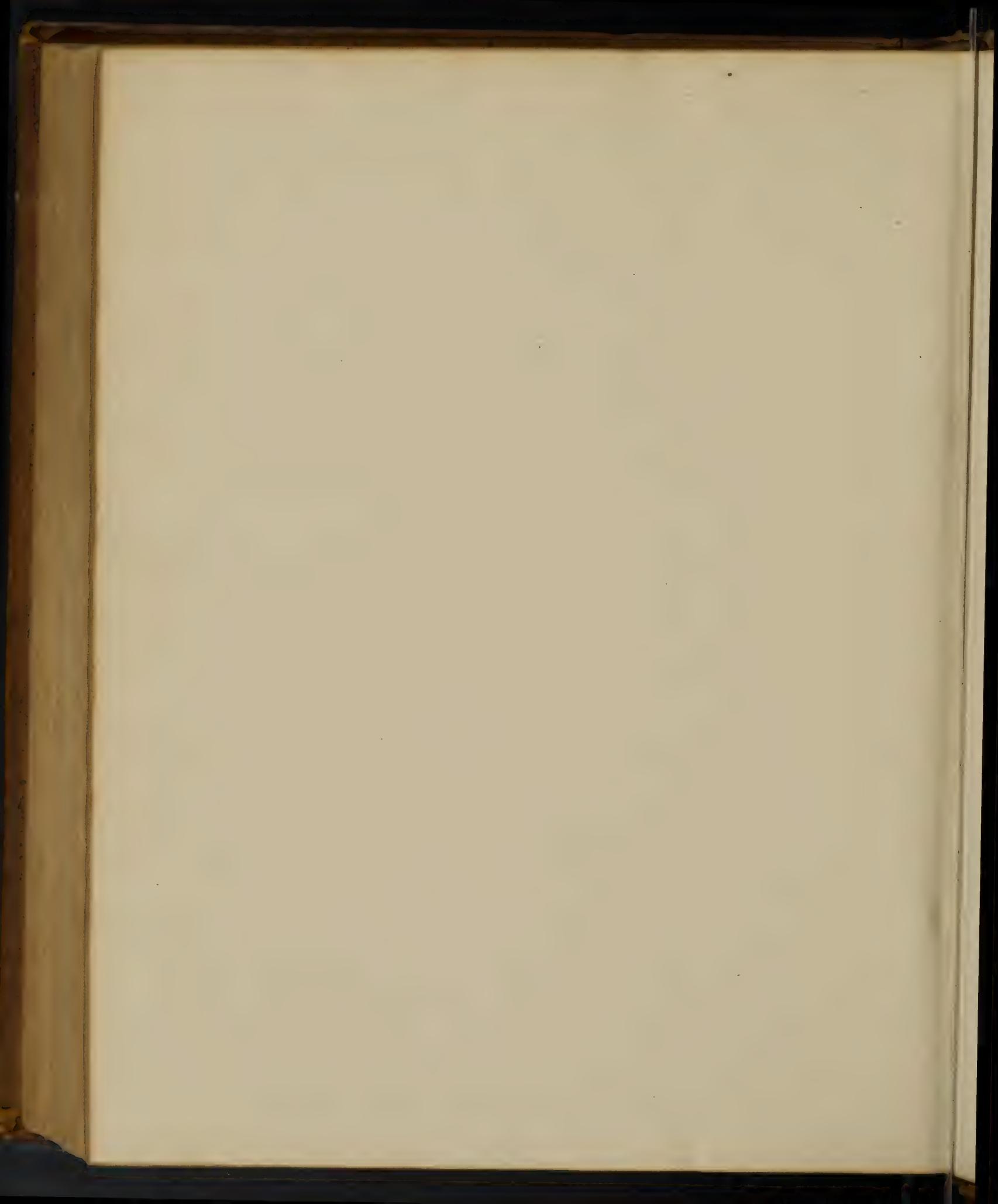


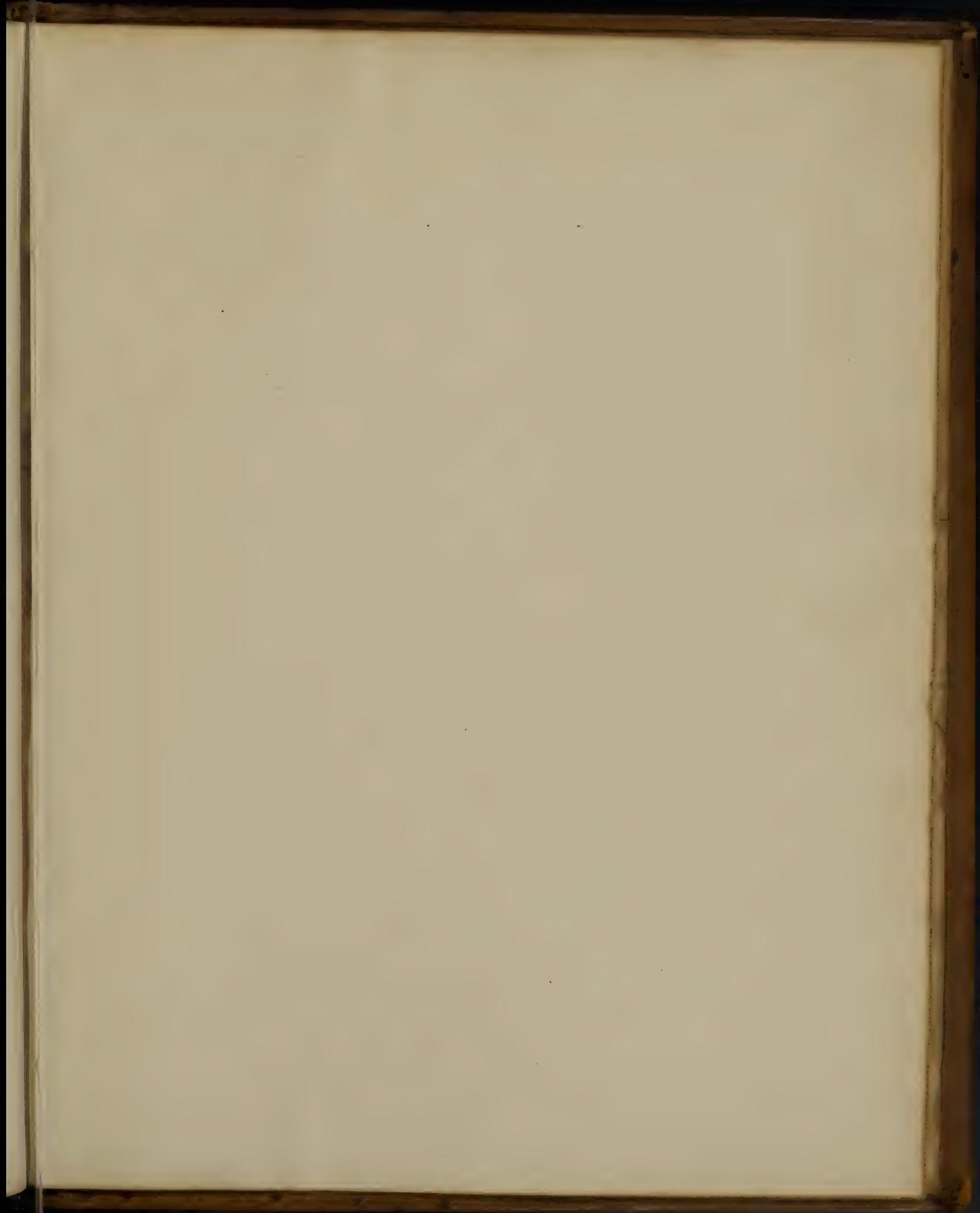


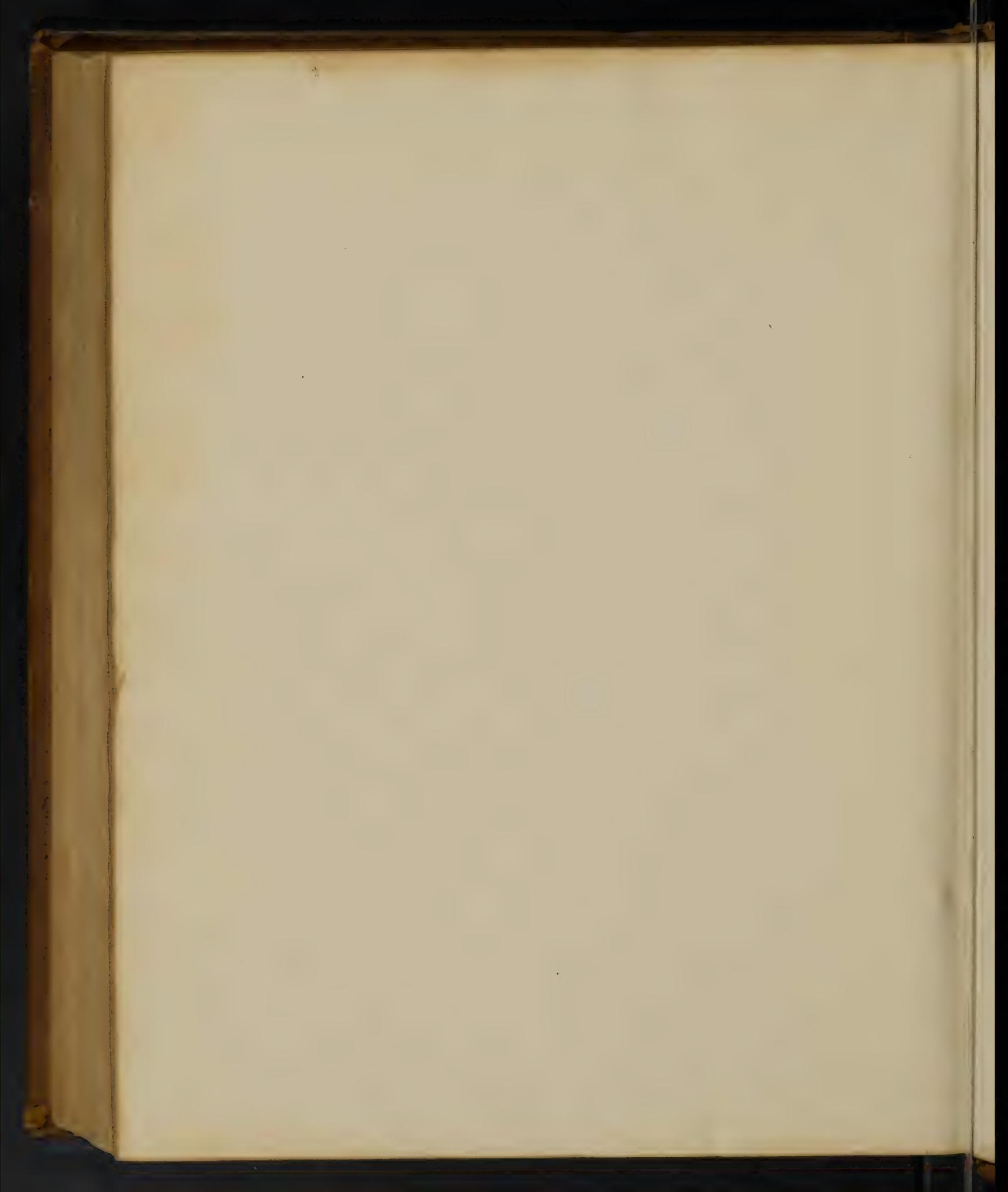


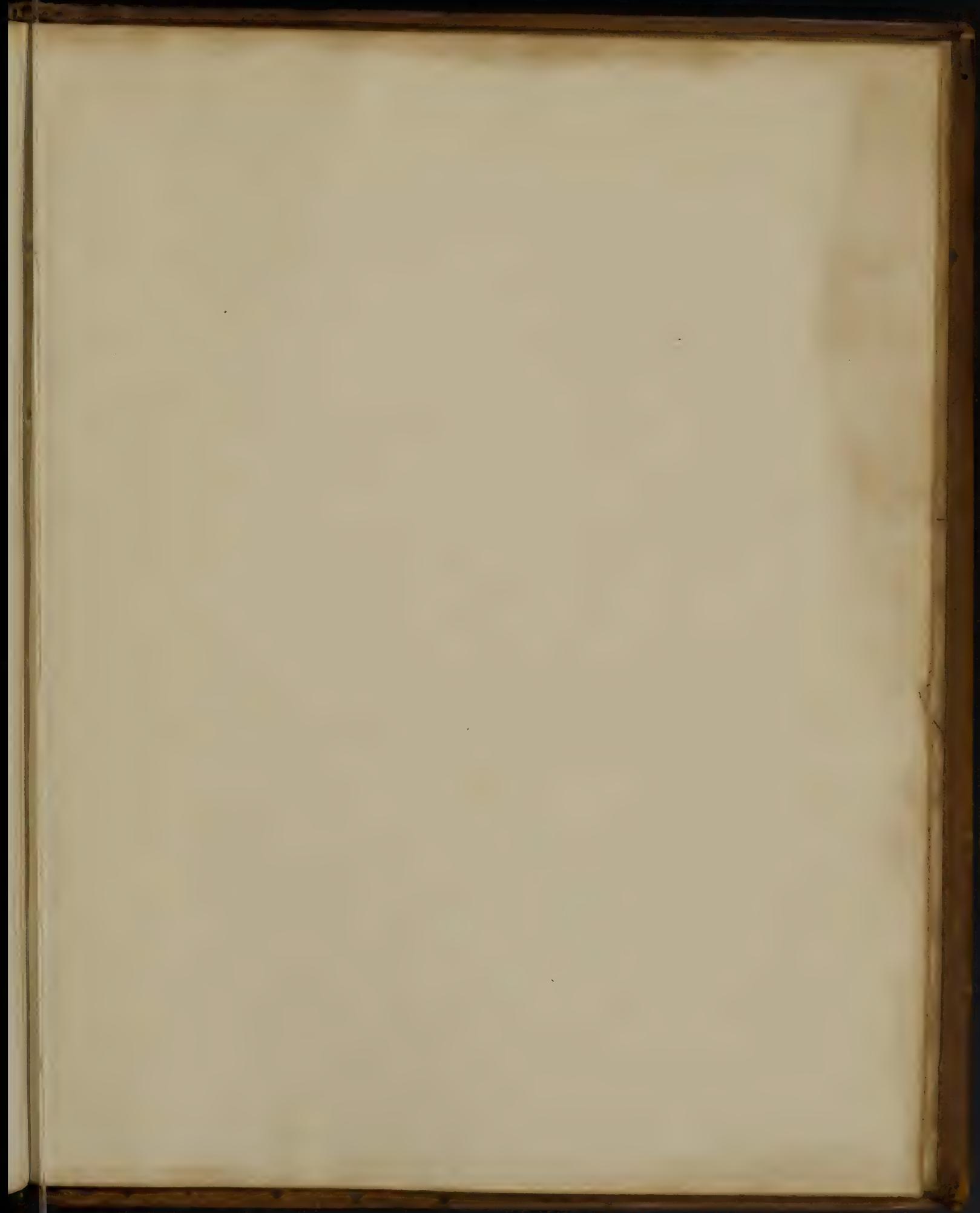


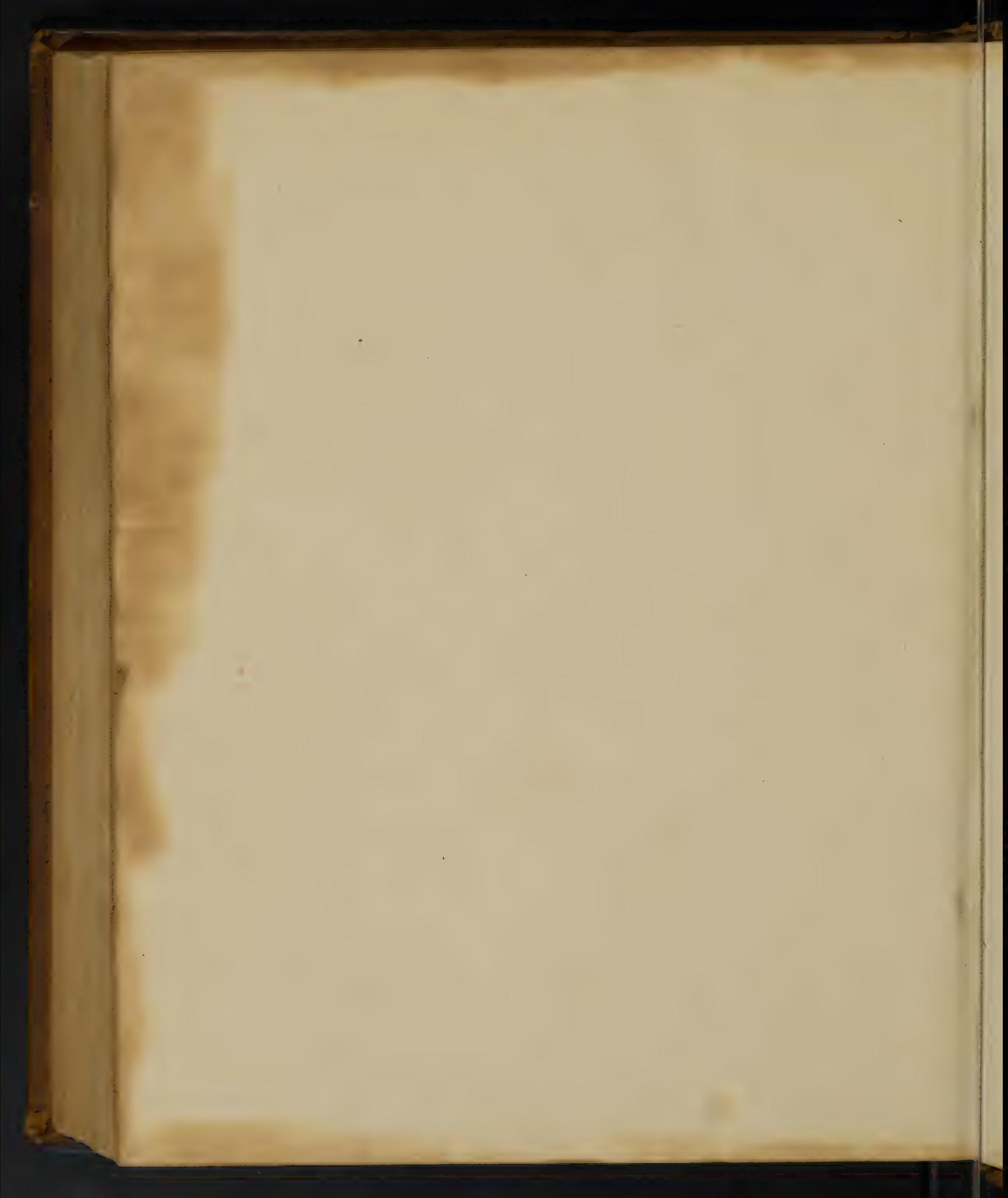


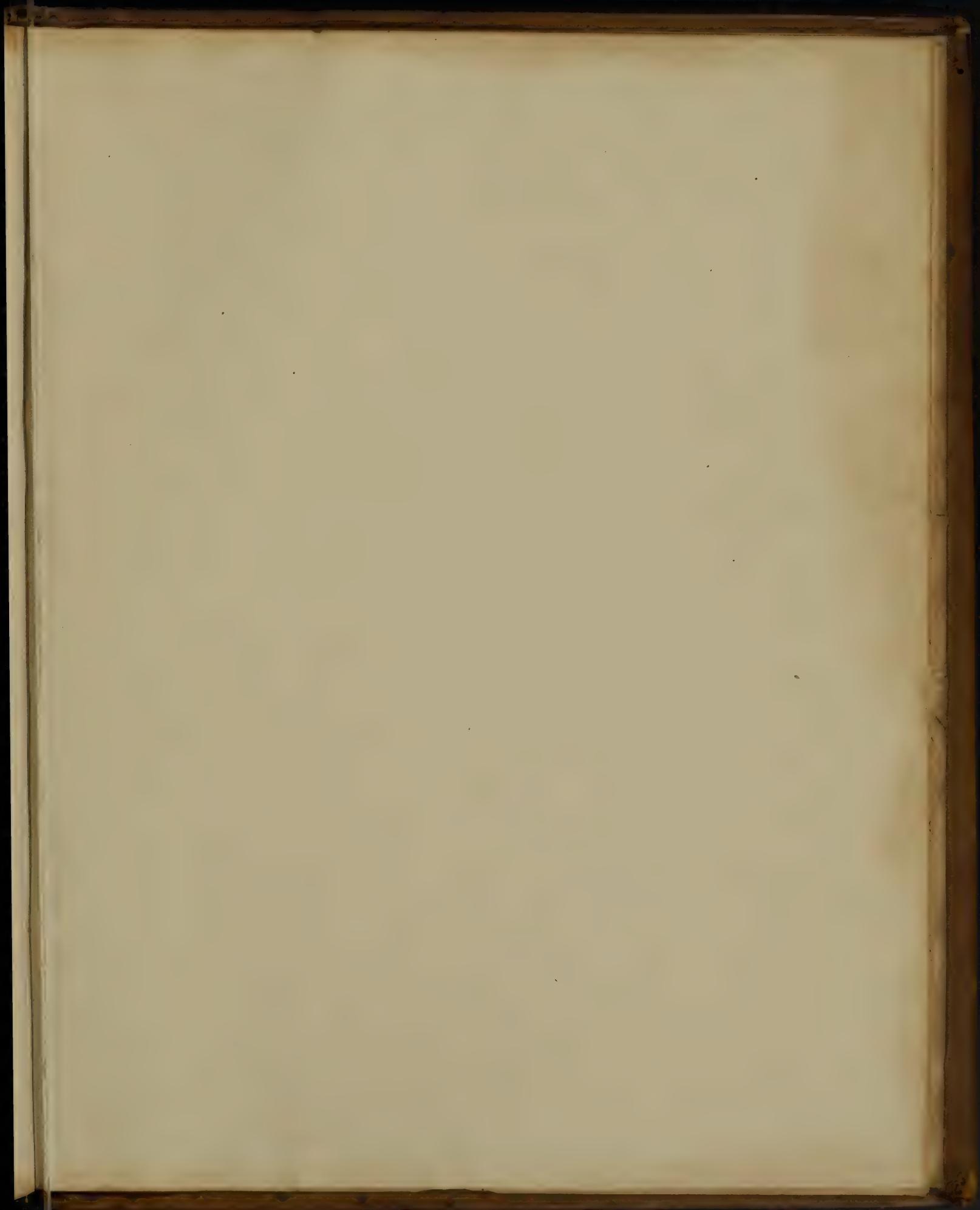


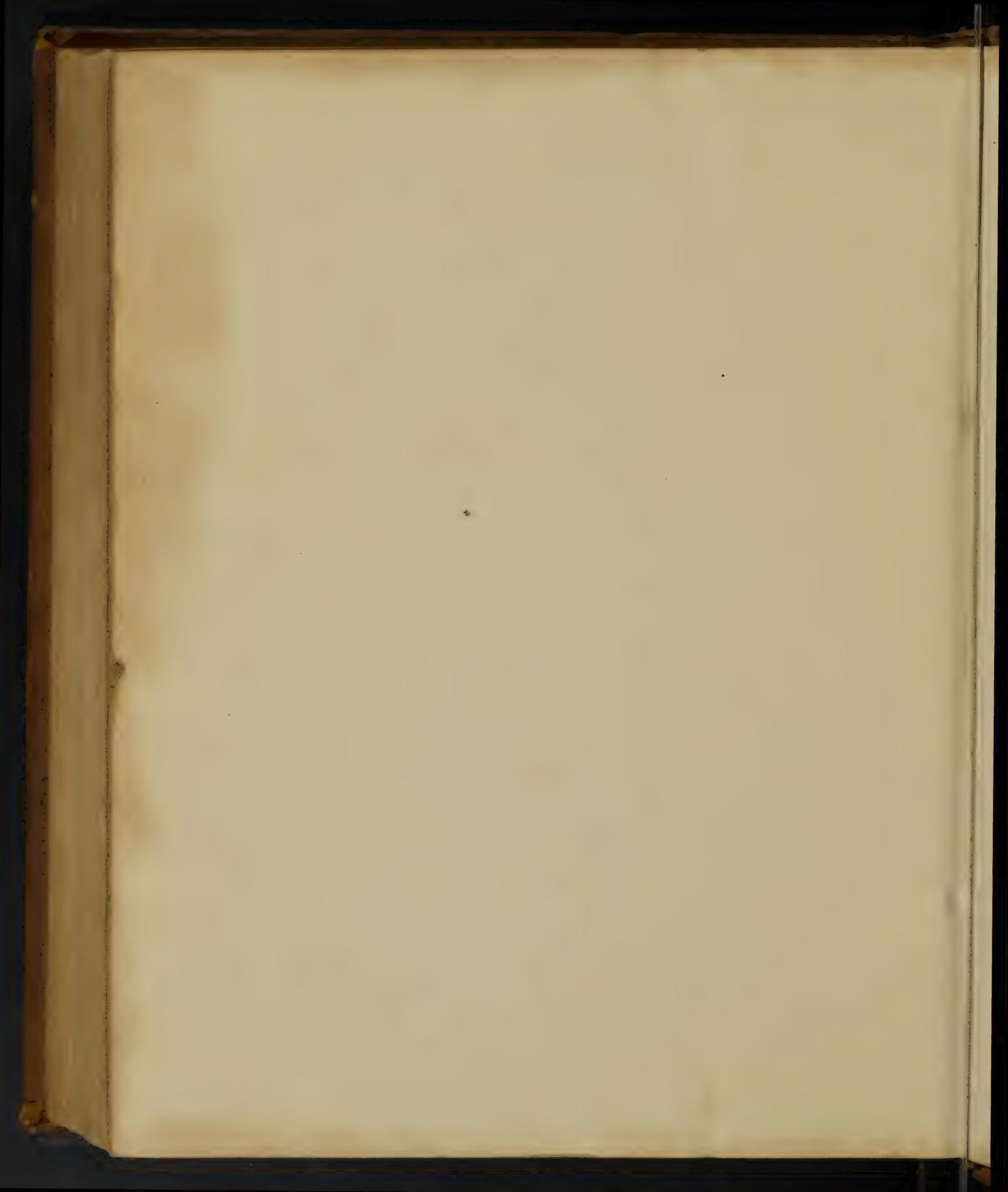


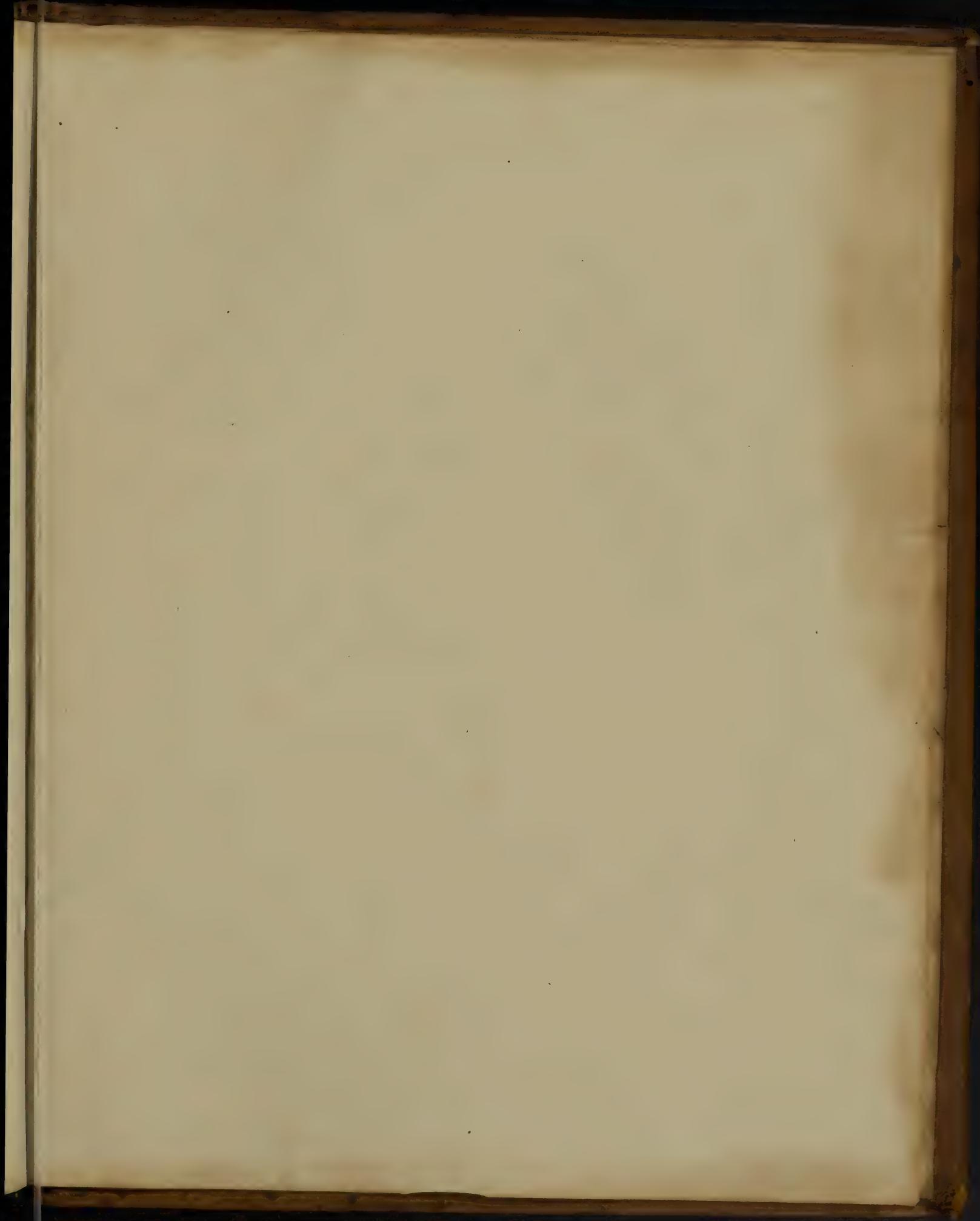


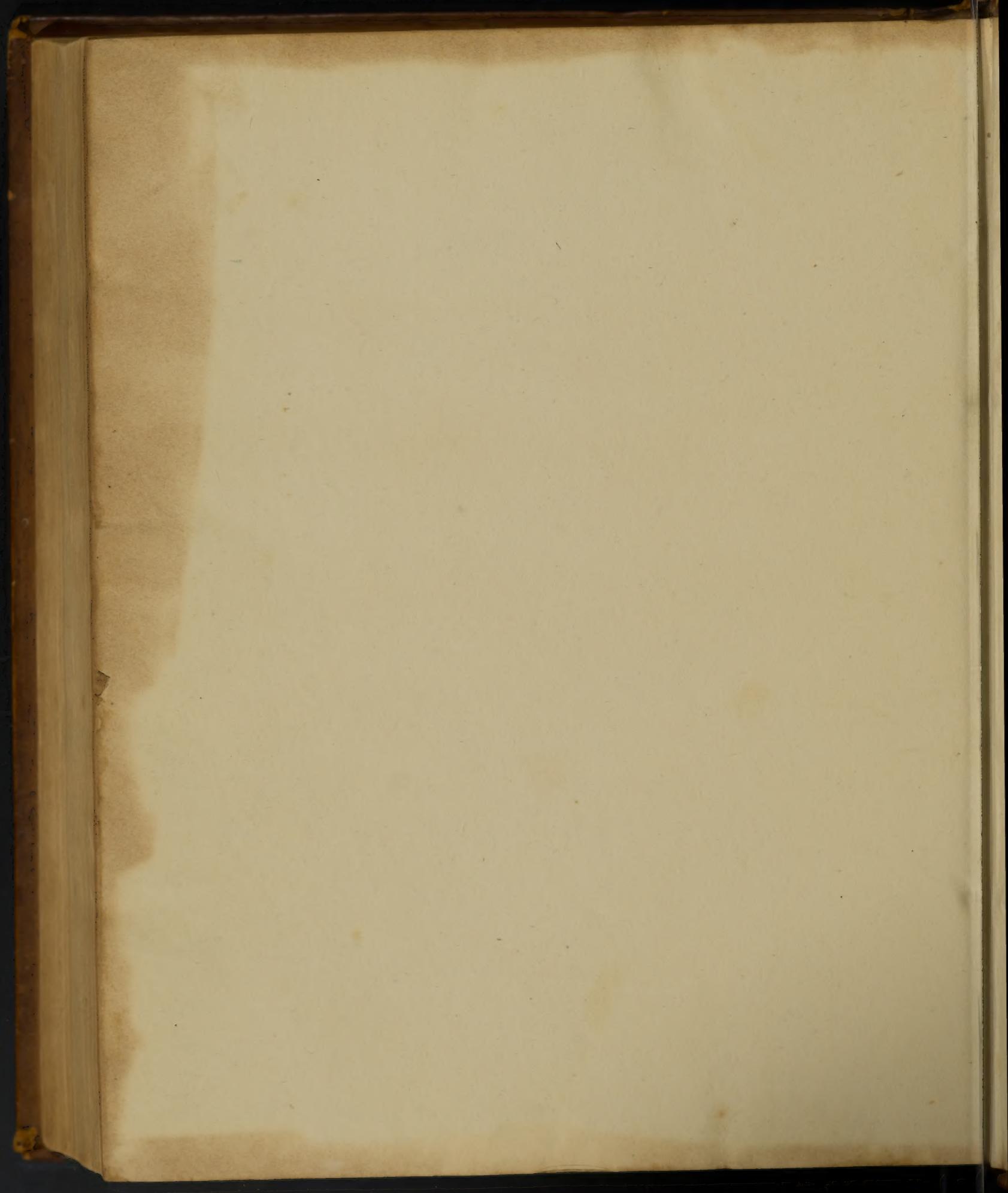




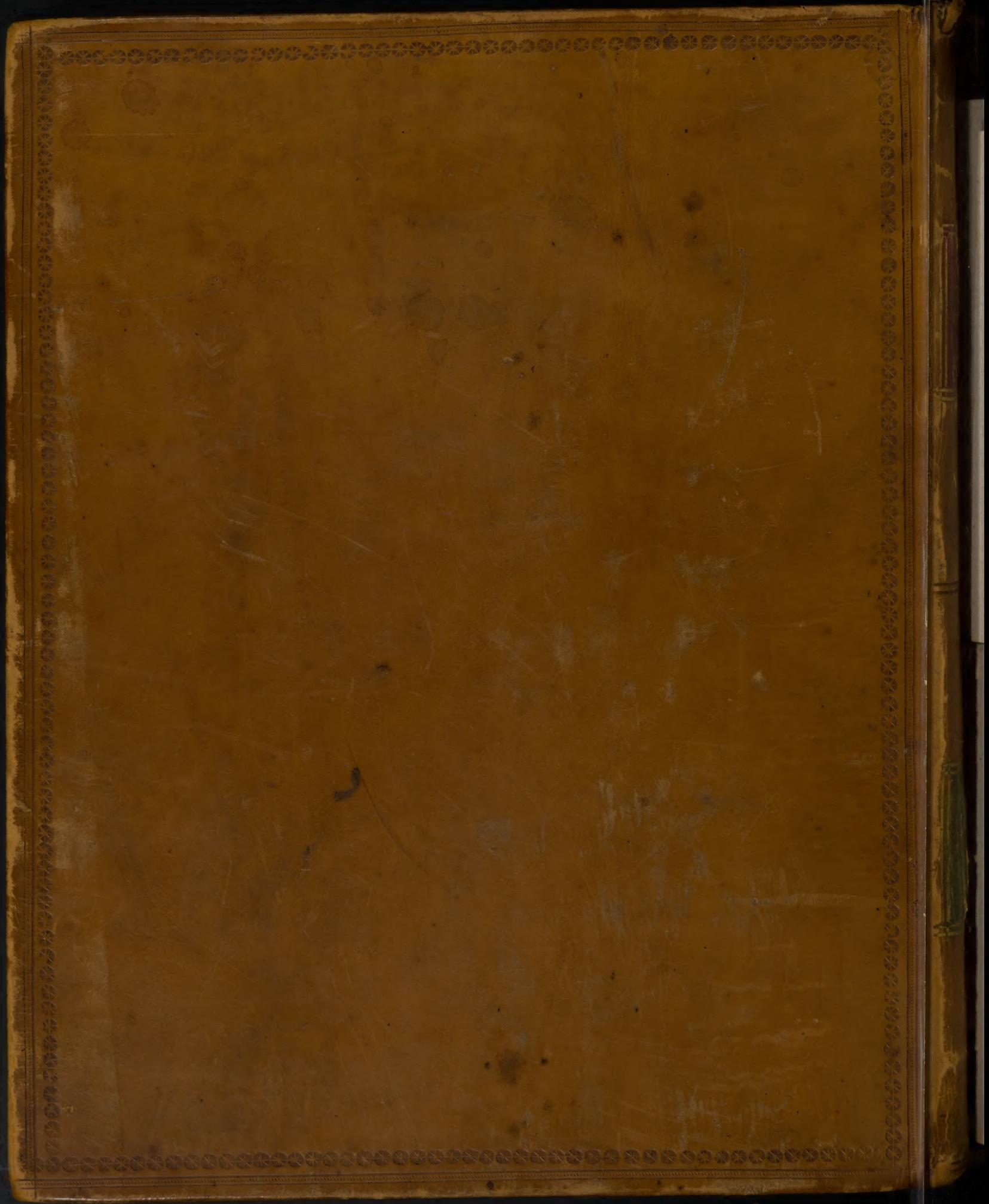








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